76-1430

No.

IN THE

Supreme Court of the United States

October Term, 1976

GIBSON PRODUCTS, INC. OF RICHARDSON,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

**Petition For A Writ of Certiorari To
The Supreme Court of the State of Texas**

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April, 1977

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IN THE
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No. _____

GIBSON PRODUCTS, INC. OF RICHARDSON,
Petitioner

v.

THE STATE OF TEXAS, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

Gibson Products, Inc., of Richardson, Petitioner herein, prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Texas entered in the above case on January 19, 1977 when it overruled the Motion for Rehearing in connection with its judgment entered on December 22, 1976. The case in the Supreme Court of Texas, No. B-5782, was styled Gibson Products Company, Inc., et al, Appellants, v. The State of Texas, Appellee. Petitioner is the only Appellant applying for Writ of Certiorari.

CITATIONS TO OPINIONS BELOW

The opinion of The Supreme Court of Texas and the dissenting opinion are reported in 545 S.W.2d 128, printed in Appendix B, page 9a hereto. This was a direct appeal from the Order of the 162nd Judicial District Court of Dallas County, Texas which is not reported, but which is reproduced in App. B, p. 18a hereto.

JURISDICTION

The judgment of the Supreme Court of Texas was issued on December 22, 1976. Motion For Rehearing was overruled on January 19, 1977. The jurisdiction of this Court is invoked under 28 USC Section 1257(3).

The State of Texas sought and obtained a temporary injunction in the 162nd District Court of Dallas County, Texas enjoining Petitioner from selling or offering for sale certain items (socks in this instance) on any consecutive Saturday and Sunday in violation of Article 9001, Texas Revised Civil Statutes (set forth at page 1a). Petitioner raised the unconstitutionality of Art. 9001 in paragraph 6 of its Motion To Dissolve Temporary Restraining Order filed December 17, 1975 in the Trial Court (p. 54a) and in paras. 2, 4, 5, and 6 of its Original Answer filed January 5, 1976 (p. 56a). Paras. 6 and 7 of the Findings of Fact and Conclusions of Law by the Trial Court show that the judge considered the contentions of unconstitutionality raised by this Petitioner as to Art. 9001, Tex.Rev.Civ.Stat. and found them constitutional (p. 20a). The Temporary Injunction Order of the 162nd District Court is set forth in App. B, p. 18a. The Notice of Limitation of Appeal (App. B, p. 59a) confined and limited the appeal to the Texas Supreme Court to the constitutionality of Art. 9001 Tex. Rev. Civ. Stat.

The opinion of the Texas Supreme Court (App. B, p. 9a) determines the constitutionality of Art. 9001 on the basis of "equal protection" and "due process arguments" and it is apparent that this decision is based upon federal constitutional provisions.

QUESTIONS PRESENTED

Where the Legislature, acting under the police powers of the state to "promote the health, recreation and welfare of the people" (Sec. 4, Art. 9001, Tex.Rev.Civ.Stat., App. A., p. 3a) prohibits the sale or offering for sale of enumerated categories of merchandise (socks in this instance) on "both the two consecutive days of Saturday and Sunday", is such action repugnant to the Fourteenth Amendment to the Constitution of the United States because:

1. It arbitrarily deprives a member of the consuming public from exercising his right to shop for and buy desired

merchandise when it is convenient, when he is free from his employment, and when he elects to do so in the pursuit of his individual freedom of choice guaranteed by the due process clause? (Comparable to the auditor's right under the First Amendment right of the consumer to know the prices offered by competitive sellers of prescription drugs).

2. It arbitrarily deprives a merchant of the right to pursue his occupation fully by depriving him of the right to sell certain merchandise (socks) where there is nothing inherently deleterious about the goods, on any day on which it is legal for that merchant to have his business place open, as guaranteed by the due process clause?

3. The State has arbitrarily discriminated against sellers of tangible products in favor of sellers of services as prohibited by the Equal Protection Clause?

4. The State has arbitrarily discriminated against sellers of certain commodities (socks) in favor of sellers of other commodities (cigarettes, liquor) as prohibited by the Equal Protection Clause?

STATUTES INVOLVED

The State Statute involved is Art. 9001 Texas Revised Civil Statutes and it is printed in full in App. A, pp. 1a-3a. Basically this Statute prohibits any person "on both the two (2) consecutive days of Saturday and Sunday" from selling or offering for sale certain categories or items of merchandise.

The constitutional challenge is under Section 1 of the Fourteenth Amendment to the United States Constitution, more particularly that portion thereof which reads as follows:

> "Section 1 . . . no State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT OF MATERIAL FACTS

The Statute is not a "Sunday Closing" law or a closing law of any kind since it does not prohibit anyone from remaining open for business on Saturdays or Sundays or consecutive Saturdays or Sundays. It prohibits any person from selling or offering for sale on "both the two (2) consecutive days of Saturday and Sunday" enumerated merchandise.

The District Attorney of Dallas County, Texas acting under the authority of Sec. 4 of Art. 9001 (p. 3a) filed a Petition in the 162nd District Court of Dallas County (App. C. p. 45a) for a temporary injunction against various defendants, including Petitioner. The Petition incorporated an affidavit of Herbert Allan Dietsche (Para. VII of the Petition, App. C, p. 48a, 53a) which recited that Dietsche had entered the store operated by Petitioner in Richardson, Dallas County, Texas, on Saturday, December 6, 1975 and had purchased six pairs of white socks and had returned on the following day, Sunday, December 7, 1975 and had purchased three pairs of white socks (App. C. p. 53a).

On December 24, 1975, following an evidentiary hearing, the trial judge issued a temporary injunction (App. B. p. 18a) finding that the Petitioner had violated Art. 9001. Tex.Rev.Civ. Stats., that selling socks on a consecutive Saturday and Sunday was a public nuisance as specified in Sec. 4 of Art. 9001, and enjoining Petitioner from further making sales of socks and/or other items enumerated in Art. 9001 on both of the two consecutive days of Saturday and Sunday. The Order further held that Art. 9001 is not in contravention of the Constitution of the United States. (App. B, p. 19a).

The trial court entered Findings of Fact and Conclusions of Law on January 9, 1976 (App. B., p. 20a) which included Conclusions of Law that sales of socks on consecutive days of Saturday and Sunday are prohibited by Sec. 1, Art. 9001, Tex. Rev.Civ.Stats. (p. 2a) and that the sale or offering for sale of socks on consecutive days of Saturday and Sunday constitutes a public nuisance **per se**; and that Art. 9001 is not in contravention of the United States Constitution. (App. B, p. 23a).

Petitioner raised the unconstitutionality of Art. 9001 in connection with the due process and equal protection clauses in its Original Answer filed January 5, 1976 with the trial court (App. C, p. 56a) earlier asserted in oral argument at the evidentiary hearing preceding the issuance of the temporary injunction and in the Motion to Dissolve Temporary Restraining order filed December 17, 1975 (App. C. p. 54a).

Petitioner filed a direct appeal to the Supreme Court of the State of Texas. It raised the constitutional questions presented in this application during oral argument and in its briefs.

Only 8 Justices were present at the time of oral argument before the Supreme Court of Texas. These Justices split 4 to 4 as to the constitutionality of Art. 9001. The case for unconstitutionality is well delineated in the dissent of the 4 Justices who were of the opinion that the statute was unconstitutional (App. B, p. 11a). The 9th Justice, who was absent during oral argument, participated in the opinion of the court holding the statute constitutional, thus giving a 5 to 4 decision as opposed to a 4 to 4 affirmance of constitutionality.

The very short opinion of the majority of the Texas Supreme Court relies primarily upon a 6 to 3 decision of the Texas Supreme Court in 1969. **State v. Spartan's Industries, Inc.** 447 S.W.2nd 407; (App. B, p. 24a, which upheld the constitutionality of Texas Penal Code Article 286a (App. A, p. 5a). Art 9001 of the Tex.Rev.Civ.Stats. and Art 286a of the

Texas Penal Code (repealed in 1973) are for all practical purposes worded identically. The main distinction is that Art. 286a of the Penal Code was a part of a group of laws which prohibited work and/or operating of business establishments on Sunday. The 1969 opinion in **Spartan's** primarily relied upon the fact that the Legislature had indicated by this group of laws (Texas Penal Code Arts. 283, 284, 285, 286, 286a, 287, all repealed in 1973, App. A, pp. 4a-8a) a design to keep trade and commerce closed on Sunday (or Saturday for Sabbatarians.)

None of these laws existed after 1973. Art. 9001 contains the text of Art. 286a, in a miscellaneous section of the civil code without support from any collateral statutes.

The 4 members of the majority of the Texas Supreme Court in the Petitioner's case consisted of 3 Justices who voted with the majority in **Spartan's, supra,** and the 4th was a Justice who was not sitting on the bench at the time of **Spartan's.** The 4 dissenting judges included the lone survivor (Chief Justice Joe Greenhill) of the 3 dissenters in **Spartan's,** a member of the majority in **Spartan's** (Justice Sears McGee) and 2 members of the court who were not on the bench at the time **Spartan's** was decided. A perusal of the detailed dissent (App. B, pp. 11a-15a) reflects that the dissent took into account the fact that Art. 9001, even though it might have the same text as Penal Code Art. 286a, must be considered in a different light since it no longer is a part of any Saturday or Sunday **closing** of trade and commerce but is an arbitrary exercise of the police power of the state which actually has **no relationship** to the health and welfare of the people of the State of Texas.

REASONS FOR GRANTING THE WRIT

Through enactment of Art. 9001, Tex. Rev. Civ. Stats., the Texas Legislature has prohibited the otherwise lawful sale of socks **only** on **both** of two consecutive days which are Saturday and Sunday. Justification is attempted by recitation of the purpose of this prohibition as being "to promote the health,

recreation and welfare of the people of this State." This is not a Saturday (or Sunday) **closing** law. Art. 9001 does not require anyone to close on any day of the week. The tenuous principle upon which the Legislature presumably acted to protect the health, recreation and welfare of the people of the State of Texas, is such that if such a law had prohibited the sale of socks on consecutive Tuesdays and Wednesdays, it would be subject to the same justifications of legality which presumably were attributed to it by the majority opinion of the Texas Supreme Court (App. B, p. 9a). As stated in the dissenting opinion, (App. B, p.11a) supported by the Chief Justice of the Texas Supreme Court, the majority did not give any reasoning for justifying this particular legislation under the police powers of the State. There appears to be no connection between this legislation and a constitutional exercise of police powers by the State of Texas, according to the dissenting opinion.

Of utmost importance to the people of the various States of this Union, is the Constitutional guarantee of the Fourteenth Amendment to the United States Constitution which seeks to prevent illegal inroads upon the rights of citizens of the States under the guise of exercise of police power when **no relationship** exists between the legislation projected and the health and welfare of the people of that State. The Fourteenth Amendment was enacted exactly for this purpose. Petitioner speaks in its own interest and also on behalf of consumers who seek to purchase socks.

If legislation which prohibits the sale of socks on both of consecutive Saturdays and Sundays (which permits the sale of socks on any Saturday or any Sunday so long as the sale is not made on two consecutive Saturdays or Sundays), is constitutionally acceptable, then the legislature could legally prohibit the sale of socks on consecutive Tuesdays and Wednesdays, or perhaps on alternate Tuesdays and Thursdays of consecutive weeks. While State Legislatures have extremely broad powers, completely arbitrary enactments without any relationship to the health and welfare of the people do not pass the test imposed by the due process clause of the Fourteenth Amendment to the Constitution of the United States.

In **State v. Spartan's Industries, Inc.** (App. B. pp. 27a-30a), the Texas Supreme Court, in a lengthy opinion, justified the passage of Art. 286a of the Penal Code on the basis that it was a part of an overall statutory group. It was presumed that the purpose of the legislature was to shut down trade and commerce on one day a week (the old Sunday Closing Laws, Texas Penal Code, Arts. 283, 284, 285, 286, 286a, and 287, App. A, p. 4a). The decision of the Texas Supreme Court in 1976 in this case did not attempt to justify Art. 9001 or to justify the exercise of police powers in this regard, and ignored the fact that there are no Sunday Laws presently in effect in the State of Texas. The Texas Supreme Court decision in the case at bar does not differentiate the background of Art. 9001 (since there is none) with the background of Art. 286a existing at the time of the **Spartan's** decision. The dissenting opinion adequately notes that the background statutory framework has been repealed (Texas Penal Code Arts. 283, 284, 285, 286, and 287) and notes that this justification can no longer be made and fails to find any justification for such alleged exercise of the police powers of the State of Texas.

Any citizen of Texas has a right in the pursuit of his freedom and happiness to shop for necessities or non-necessities at a time which is convenient for him, when he is off duty from his employment. This right is protected from invasion by the State by the Fourteenth Amendment to the United States Constitution which guarantees that he shall have due process of law in the event the State seeks to deprive him of any liberty. A citizen desiring to exercise his right to buy a pair of socks (or 3 pairs of socks) cannot have that right taken away from him by the State unless there is **some** connection, **some** justification for the State's assertion that such sale is illegal. This concept is somewhat analogous to the First Amendment right of the auditor to have access to advertisements of the price of prescription drugs. **Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.** 96 S. Ct. 1817 (1976). In that case, as here, there is **no** relation between the right of

the State of Texas to protect the health and welfare of its citizens and the prohibition of the sale of socks on "both the two consecutive days of Saturday and Sunday" Art. 9001 is repugnant to the due process requirements of the Fourteenth Amendment.

The Trial Court found that the sale of socks on consecutive days of Saturday and Sunday is a public nuisance (Findings of Fact and Conclusions of Law, App. B, p. 20a). Sec. 4 of Art. 9001, Tex. Rev. Civ. Stats., declares the operation of any business contrary to the provisions of Art. 9001 to be a "public nuisance" (App. A, p. 3a). Petitioner has thus been denied its right to sell socks on the two consecutive days of Saturday and Sunday without due process of law, since there is **no** relationship between such a legislative pronouncement and the stated purpose of promoting the "health, recreation and welfare" of the people of Texas. The mere declaration of a procedure as being a "public nuisance" is of no effect if there is not a nuisance in fact. There is nothing about the sale of socks on consecutive days of Saturday and Sunday that lends itself to being a nuisance in fact. This is pointed out by the narrow confines of Art. 9001, which make it legal to sell socks on Saturday and on Sunday, **unless** it happens that the Saturday and Sunday chosen for the sale are **consecutive**. Thus, the emphasis of the **malum prohibitum** is the word "**consecutive**".

The dissenting opinion of the Texas Supreme Court in this case found 4 Justices who could not conceive of any connection between such a prohibition and the right of the State to provide for the health, welfare and recreation of its people. From the brevity of the majority opinion it is deduced that the 4 Justices who heard the argument and the 5th who did not, were unable to conjure up any relationship.

By its self-proclaimed declaration of legislative intent, the Texas Legislature attempt to turn an othrwise lawful and harmless act into a "public nuisance". Such legislative

prohibition, without justification, summarily deprives Petitioner of its right to pursue its business. Thus Petitioner is arbitrarily deprived of its right to due process guaranteed by the Fourteenth Amendment.

Art. 9001 Tex. Rev. Civ. Stats. prohibits the sale or offering for sale of certain items, or categories of goods on the consecutive days of Saturday and Sunday (App. A, p. 2a). This discriminates in favor of the sellers of services as distinguished from the sellers of goods. It also discriminates between sellers of certain consumer items (such as socks) and sellers of other consumer items (such as guns, cigarettes, whiskey) which are not covered by the statute. Discrimination of an arbitrary nature, with no relationship to the police power of the State is prohibited by the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Equal protection is not narrowly construed when applied to State legislation. Nevertheless if the discrimination is completely arbitrary and there is **no** relation to the police powers of the State, then such legislation is repugnant to the equal protection clause of the Fourteenth Amendment. This Court in **City of New Orleans v. Dukes,** 96 S. Ct. 2513 (1976), described the broad latitude afforded, state legislative enactments under the equal protection clause. The Court pointed out that in cases of "invidious discrimination, the wholly arbitrary act" cannot stand consistently with the Fourteenth Amendment. The discriminations applied by the Texas Legislature in Art. 9001 are totally arbitrary and have no conceivable relationship to the stated purpose to protect the health, welfare and recreation of the people of the State of Texas.

CONCLUSION

The decision of the Texas Supreme Court in this matter was in error. The decision is so erroneous that a writ of certiorari should be issued by this court to the Texas Supreme Court to

correct the judgment and to prohibit the deterioration of the application of the law of due process and equal protection to the citizens of the State of Texas.

Four of the eight judges hearing oral argument on behalf of the Texas Supreme Court agree that Art. 9001 of the Tex. Rev. Civ. Stats. is unconstitutional. The findings of these four justices is presented in detail in the dissenting opinion, is well reasoned, and is sufficiently detailed to reflect the correctness of their dissent. On the other hand, the majority opinion subscribed to by the other four judges hearing the argument and the ninth judge who did not hear the argument, is so preemptory that it lacks clarification or justification of the constitutionality of Art. 9001.

Note that Justice Sears McGee was so impressed with the distinction between the **Spartan's** decision of 1969 by the Supreme Court involving Texas Penal Code 286a (which survived constitutional challenge by a 6 to 3 margin because it was part of the Sunday Laws of Texas) and Art. 9001 which has no such background, that he deemed Art. 9001 **unconstitutional** although he had found 286a **constitutional** in **Spartan's**.

Art. 9001 is wholly arbitrary, has no connection with the stated purpose of promoting the health, welfare and recreation of the people of the State of Texas. Instead, it is a subterfuge to restrict competition in the sale of certain items, this refuting its avowed purpose of promoting the health, welfare and recreation of the people.

The invidious discrimination against sellers of selected products in favor of sellers of services, and the discrimination against sellers of certain items (socks) and in favor of sellers of other items, (guns, cigarettes, whiskey) is the type of blatant discrimination aimed at by the guarantee of equal protection of the laws. There is no inherent danger to the public in the selling of socks, but it is commonly accepted that cigarettes and whiskey are detrimental to the health of persons

and no discrimination based upon health, welfare and recreation appears to foster the prohibition against the sale of socks on the two consecutive days of Saturday and Sunday.

This is **not** a Sunday Closing Law; it does not close anything on any day; it does **not** prohibit the sale of socks on Saturday; it does **not** prohibit the sale of socks on Sunday. But it does prohibit the sale of socks on two **consecutive** days of Saturday and Sunday. If this theory is valid as a proper exercise of the police power of the State, then a prohibition of the sale of socks on consecutive Tuesdays and Wednesdays, on Tuesdays and Thursdays in the same week, or on consecutive numbered days in any month (15th and 16th of April), would likewise be a legitimate exercise of police power.

Petitioner represents to the Court that the majority decision of the Supreme Court of Texas does not reflect a correct interpretation of the restrictions of the Fourteenth Amendment to the Constitution of the United States and this Court should take the opportunity to correct that interpretation before it inflicts further damage on the citizens of Texas, including this Petitioner, by depriving them of their rights guaranteed under the Constitution of the United States.

Petitioner requests that the writ of certiorari be granted for the reasons stated above.

Respectfully submitted,

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April 11, 1977

APPENDIX

APPENDIX A

VERNON'S ANNOTATED CIVIL STATUTES

TITLE 132 - OCCUPATIONS AND BUSINESS

CHAPTER TWENTY—MISCELLANEOUS

Art.

Art. 9001. Sale of goods on both the two consecutive days of Saturday and Sunday

Prohibition of sales; items; misdemeanor

Section 1. Any person, on both the two (2) consecutive days of Saturday and Sunday, who sells or offers for sale or shall compel, force or oblige his employees to sell any clothing; clothing accessories; wearing apparel; footwear; headwear; home, business, office or outdoor furniture; kitchenware; kitchen utensils; china; home appliances; stoves; refrigerators; air conditioners; electric fans; radios; television sets; washing machines; driers; cameras; hardware; tools, excluding non-power driven hand tools; jewelry; precious or semi-precious stones; silverware; watches; clocks; luggage; motor vehicles; musical instruments; recordings; toys, excluding items customarily sold as novelties and souvenirs; mattresses; bed coverings; household linens; floor coverings; lamps; draperies; blinds; curtains; mirrors; lawn mowers or cloth piece goods shall be guilty of a misdemeanor. Each separate sale shall constitute a separate offense.

Sales for charitable and funeral or burial purposes; real property sales

Sec 2. Nothing herein shall apply to any sale or sales for charitable purposes or to items used for funeral or burial purposes or to items sold as a part of or in conjunction with the sale of real property.

First offense; subsequent convictions; penalties

Sec. 3. For the first offense under this Act, the punishment shall be by fine of not more than One Hundred Dollars ($100.00). If it is shown upon the trial of a case involving a violation of this Act that defendant has been once before convicted of the same offense, he shall on his second conviction

and on all subsequent convictions be punished by imprisonment in jail not exceeding six (6) months or by a fine of not more than Five Hundred Dollars ($500.00), or both.

Purpose; public nuisances; injunction; application and proceedings

Sec. 4 The purpose of this Act being to promote the health, recreation and welfare of the people of this state, the operation of any business whether by any individual, partnership or corporation contrary to the provisions of this Act is declared to be a public nuisance and any person may apply to any court of competent jurisdiction for and may obtain an injunction restraining such violation of this Act. Such proceedings shall be guided by the rules of other injunction proceedings.

Emergency purchases; certification

Sec. 4a. Repealed by Acts 1967, 60th Leg., p. 79, ch. 39 § 1, eff. Aug. 28, 1967.

Occasional sales

Sec. 5 Occasional sales of any item named herein by a person not engaged in the business of selling such item shall be exempt from this Act.

Legislative intent

Sec. 5a. It is the intent of the Legislature that Articles 286 and 287 of the Penal Code of Texas[1] are not to be considered as repealed by this Act; provided, however, that the provisions of said Articles shall not apply to sales of items listed in Section 1 of this Act which are forbidden to be sold on the day or days named in this Act.

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1. Now repealed by Acts 1973, 63rd Leg., p. 991, ch. 399 § 3(a), enacting the new Texas Penal Code.

VERNON'S ANNOTATED PENAL CODE OF TEXAS

TITLE 7 - RELIGION AND EDUCATION

* * *

CHAPTER TWO

SUNDAY LAWS

* * *

Article 283. [299] [196] [183] Working on Sunday

Any person who shall labor, or compel, force, or oblige his employes, workmen, or apprentices to labor on Sunday, or any person who shall hunt game of any kind whatsoever on Sunday within one-half mile of any church, school house, or private residence, shall be fined not less than ten nor more than fifty dollars.

Art. 284. [300] [197] [184] Not applicable

The preceding article shall not apply to household duties, works of necessity or charity; nor to necessary work on farms or plantations in order to prevent the loss of any crop; nor to the running of steamboats and other water crafts, rail cars, wagon trains, common carriers, nor to the delivery of goods by them or the receiving or storing of said goods by the parties or their agents to whom said goods are delivered; nor to stages carrying the United States mail or passengers; nor to foundries, sugar mills, or herders who have a herd of stock actually gathered and under herd; nor to persons traveling; nor to ferrymen or keepers of toll bridges, keepers of hotels, boarding houses and restaurants and their servants; nor to keepers of livery stables and their servants; nor to any person who conscientiously believes that the seventh or any other day of the week ought to be observed as the Sabbath, and who actually refrains from business and labor on that day for religious reasons.

Art. 285. [301] [198] [185] Horse racing or gaming on Sunday

Any person who shall run or be engaged in running any horse race, or who shall be engaged in match shooting or any species of gaming for money or other consideration, within the limits of any city or town on Sunday, shall be fined not less than Twenty Dollars ($20) nor more than Fifty Dollars ($50).

Amended by Acts 1963, 58th Leg., p. 95, ch. 55 § 1.

Art. 286 [302] [199] [186] Selling goods on Sunday

Any merchant, grocer, or dealer in wares or merchandise, or trader in any business whatsoever, or the proprietor of any place of public amusement, or the agent or employe of any such person, who shall sell, barter, or permit his place of business or place of public amusement to be open for the purpose of traffic or public amusement on Sunday, shall be fined not less than twenty nor more than fifty dollars. The term place of public amusement, shall be construed to mean circuses, theaters, variety theaters and such other amusements as are exhibited and for which an admission fee is charged; and shall also include dances at disorderly houses, low dives and places of like character, with or without fees for admission.

Article 286a. Sale of Goods on both the two consecutive days of Saturday and Sunday

Prohibition of sales; items; misdemeanor

Section 1. Any person, on both the two (2) consecutive days of Saturday and Sunday, who sells or offers for sale or shall compel, force or oblige his employees to sell any clothing; clothing accessories, wearing apparel; footwear; headwear; home, business, office or outdoor furniture; kitchenware; kitchen utensils; china; home appliances; stoves; refrigerators; air conditioners; electric fans; radios; television sets; washing

machines; driers; cameras; hardware; tools, excluding non-power driven hand tools; jewelry; precious or semi-precious stones; silverware; watches; clocks; luggage; motor vehicles; musical instruments; recordings; toys, excluding items customarily sold as novelties and souvenirs; mattresses; bed coverings; household linens; floor coverings; lamps; draperies; blinds; curtains; mirrors; lawn mowers or cloth piece goods shall be guilty of a misdemeanor. Each separate sale shall constitute a separate offense.

Sales for charitable and funeral or burial purposes; real property sales.

Section 2. Nothing herein shall apply to any sale or sales for charitable purposes or to items used for funeral or burial purposes or to items sold as a part of or in conjunction with the sale of real property.

First offense; subsequent convictions; penalties

Section 3. For the first offense under this Act, the punishment shall be by fine of not more than One Hundred Dollars ($100.00). If it is shown upon the trial of a case involving a violation of this Act that defendant has been once before convicted of the same offense, he shall on his second conviction and on all subsequent convictions be punished by imprisonment in jail not exceeding six (6) months or by a fine of not more than Five Hundred Dollars ($500.00), or both.

Purpose; public nuisances; injunction; application and proceedings

Section 4. The purpose of this Act being to promote the health, recreation and welfare of the people of this state, the operation of any business whether by any individual, partnership or corporation contrary to the provisions of this Act is declared to be a public nuisance and any person may apply to any court of competent jurisdiction for and may obtain an

injunction restraining such violation of this Act. Such proceedings shall be guided by the rules of other injunction proceedings.

Emergency purchases; certification

Section 4a. When a purchaser will certify in writing that a purchase of an item of personal property is needed as an emergency for the welfare, health or safety of human or animal life and such purchase is an emergency purchase to protect the health, welfare or safety of human or animal life, then this Act shall not apply; provided such certification signed by the purchaser is retained by the merchant for proper inspection for a period of one (1) year.

Occasional sales

Section 5. Occasional sales of any item named herein by a person not engaged in the business of selling such item shall be exempt from this Act.

Legislative intent

Section 5a. It is the intent of the Legislature that Articles 286 and 287 of the Penal Code of Texas are not to be considered as repealed by this Act; provided, however, that the provisions of said Articles shall not apply to sales of items listed in Section 1 of this Act which are forbidden to be sold on the day or days named in this Act. Acts 1961, 57th Leg., 1st C. S., p. 38, ch. 15. (Effective 90 days after Aug. 8, 1961, date of adjournment.)

Art 287. Permitting sale of certain articles on Sunday; regulations as to motion picture shows

The preceding Article shall not apply to markets or dealers in provisions as to sales of provisions made by them before nine o'clock A. M., nor to the sales of burial or shrouding material,

newspapers, ice, ice cream, milk, nor to any sending of telegraph or telephone messages at any hour of the day or night, nor to keepers of drug stores, hotels, boarding houses, restaurants, livery stables, bath houses, or ice dealers, nor to telegraph or telephone offices, nor to sales of gasoline, or other motor fuel, nor to vehicle lubricants, nor to motion picture shows, or theatres operated in any incorporated city or town, after one o'clock P.M.

Sec. 2 The Commissioners or City Council of the towns or cities in which said motion picture shows or theatres are located shall have the right and power by proper ordinance to prohibit or regulate the keeping open or showing of such motion picture shows or theatres on Sunday.

APPENDIX B

OPINIONS AND RELATED ORDERS

OPINION OF TEXAS SUPREME COURT

No. B-5782.

GIBSON PRODUCTS COMPANY, INC.,

et al., Appellants,

v

The STATE of Texas, Appellee.

Dec. 22, 1976

Rehearing Denied Jan. 19, 1977

REAVLEY, Justice.

We have here another attack upon the constitutionality of the Sunday (or Saturday) closing law. The trial court enjoined appellants from selling or offering for sale, on consecutive Saturdays and Sundays, the merchandise enumerated in the statute; a direct appeal was then taken to this Court under Art. 1738a, Vernon's Ann.Tex.Civ. Stat.

(1) The sole contention is that the closing law is unconstitutional. The law is now Art. 9001, Vernon's Ann.Tex.Civ.Stat. It was formerly Art 286a of the Penal Code; when the new Penal Code was enacted in 1973, this particular law was transferred intact to the civil statutes. It has often been upheld as constitutional against the same equal protection and due process arguments as are repeated here. **State v. Spartan's**

Industries, Inc., 447 S.W.2d 407 (Tex.1969), dismissed for want of a substantial federal question, 397 U.S. 590, 90 S.Ct. 1359, 25 L.Ed.2d 596; **Ralph Williams Gulfgate Chrysler Plymouth, Inc. v. State,** 466 S.W.2d 639 (Tex.Civ.App.1971, writ ref'd n.r.e.); **Sundaco, Inc. v State,** 463 S.W.2d 528 (Tex.Civ.App.1970, writ ref'd n.r.e.); **Levitz Furniture Co. v. State,** 450 S.W.2d 96 (Tex.Civ.App. 1969, writ ref'd n.r.e.).

Appellants point to the 1973 repeal of the Penal Code provisions (Arts. 283-287) which broadly prohibited labor and sales on Sunday, leaving only Art. 9001 as the constraint against sales on Saturday **and** Sunday. They argue that this bare constraint has no rational justification for what may be sold and for who may sell and for when the sales may be made. They argue that the proscriptions now have no reasonable relation to the health, recreation or welfare of the people.

Art 286a, which was under review by this Court in 1969, did more than add the device of a court injunction to the sanction of the Penal Code prohibition against Sunday business operations. It removed all penalties for the sale of the enumerated items on Sunday by those who did not sell any of the items on Saturday. The need to justify that different treatment for those who chose to close shop on Saturday and open on Sunday took us to the same constitutional questions facing us in the present case.

(2) In **State v. Spartan's Industries, Inc.,** supra, we said that we understood the principal plan of this statute to be the provision of effective sanctions to close most mercantiie establishments on Sunday—Saturday being the better day for sales than Sunday. Allowing latitude for Sabbatarians and for some who prefer to tend only the Sunday trade, the Legislature thereby maintains the prevailing custom of people doing their serious shopping for clothing, furniture, automobiles, household and office appliances, and hardware on weekdays. When the Legislature retained the statute in 1973, it apparently decided to continue to serve that purpose. We regard the matter as a legislative question and reaffirm the constitutionality of the present statute.

The judgment of the trial court is affirmed.

Dissenting opinion by DOUGHTY, J., in which GREENHILL, C.J., and McGEE and SAM D. JOHNSON, JJ., join.

DOUGHTY, Justice (dissenting).

I respectfully dissent.

The question is not whether the legislature could require all merchants to close one day a week. That constitutional question has already been decided in **State v. Spartan's Industries, Inc.,** 447 S.W.2d 407 (Tex.1969). The question before us is this: assuming, as the majority opinion does, that all merchants may remain open seven days a week, may the legislature arbitrarily prohibit the sale of certain merchandise on both Saturday and Sunday?

The majority correctly points out that Tex.Rev.Civ.Stat.Ann. art. 9001[1] was originally codified as article 286a of the Penal Code of 1925. As such, this court held it constitutional in **Spartan's Industries, Inc.** In 1973 the Texas Legislature enacted the present Penal Code and repealed much of the Penal Code of 1925. Certain articles, however, including article 286a, were transferred to the civil statutes. Tex.Laws of 1973, ch. 399, § 5, at 995. Among provisions repealed by the legislature were articles 283—286 and article 287[2] of the Penal Code of 1925. Prior to their repeal these statutes had broadly prohibited any labor or sales on Sunday. The net effect of this legislative activity was to remove nearly all constraints on Sunday labor, including the sale of merchandise, prohibiting only the sale of goods specified in article 9001. Gibson's contends that article 9001, stripped of its former framework of Sunday closing laws is unconstitutional because it denies equal protection and due process of the law and because it constitutes an unlawful exercise of police power.

I. Equal Protection

In **Spartan's Industries,** Spartan's, as I understand the opinion, based its equal protection argument on the difference in penalties for violation of Sunday closing laws. Under article 286, violators of the general closing requirement faced a maximum penalty of $50.00. Article 286a, applicable to a small group of merchants[3] selling enumerated items, provided for enforcement of its provisions by injunctive relief. This court rejected the contention that such a distinction was discriminatory and indicated that the legislature was at liberty to treat flagrant violations of the law in a more severe manner as long as discrimination among competitors was avoided. 447 S.W.2d at 413.

The situation which we now face differs significantly from that before us in **Spartan's Industries.** The rational basis for the classification in article 286a—to insure that these flagrant violators of article 286, who might ignore a $50.00 fine, closed on Sunday—is no longer present. In **Spartan's Industries,** we pointed out that article 286a "specifically provides in Sec. 5a that the older Sunday closing laws are not repealed." 447 S.W.2d at 410. Article 9001, on the other hand, is not part of a broader framework designed to insure that all merchants, with a few exceptions, close. Instead, it is intended to force only stores selling particular goods to close. Those who fail to comply face an injunction. All other places of business may continue doing business on Saturday and Sunday as they would on any other day of the week.

The question then becomes whether there is some other rational basis upon which to uphold this legislation. The State argues, and by relying on **Spartan's Industries** the majority apparently agrees, that article 9001 is a valid solution to complex problems concerning first amendment freedom of religion. Both point out that the option of opening on either Saturday or Sunday was adopted with Sabbatarians in mind.

This argument is wide of the mark. Accepting the premise that there is a constitutional problem of religious liberty involved,[4] it is not readily apparent why the legislature has prohibited certain merchants (i. e. those dealing in the listed merchandise) from selling on both Saturday and Sunday, while allowing all other merchants to sell on both days. The question why such a classification is rational remains. The provision of article 9001 forcing a choice of Saturday or Sunday sales could perhaps be justified on religious grounds if all sales on consecutive Saturdays and Sundays were prohibited. With the repeal of article 283, however, no such prohibition exists.

The majority has not attempted to suggest a rationale for this classification. I do not think one exists. I would hold that article 9001 is a discriminatory classification, denying Gibson's equal protection of the law.

II. Due Process

An equally compelling reason to overturn this statute lies in the constitutional requirement of due process. Although there is legislative discretion in the area of economic regulation, the measure adopted must bear a reasonable relation to the proposed end. **Spartan's Industries,** supra at 414. In **Spartan's Industries,** we held that it was reasonable to provide for injunctive relief against certain violators of the Sunday closing law in order to obtain the objective of a one-day surcease from commerce. 447 S.W.2d at 411—12. The legislature, by repealing articles 283—286 and article 287, apparently abandoned this objective. Presumably the legislature believed that the health, recreation, and welfare of the people of the state no longer required general abstience from commerce one day a week

The majority opinion, however, disagrees; the legislative objective remains "to close most mercantile establishments on Sunday." Can it be said that the legislature was reasonably entitled to expect that article 9001 would attain the admittedly

valid objective of limiting Sunday operations only by Sabbatarians and perhaps an occasional small storekeeper? I think not. Prohibiting the sale of certain merchandise on either Saturday or Sunday of any given week in no way limits the ability of the citizenry in general to carry on commerce if all other business may continue.

> The line where the police power of the state encounters the barrier of substantive due process is not susceptible of exact definition. As a general rule the power is commensurate with, but does not exceed, the duty to provide for the real needs of the people in their health, safety, comfort and convenience as consistently as may be with private property rights. The guarantee of due process does not deprive the state of the right to take private property by the exercise of such power in a proper and lawful manner, but it is essential that the power be used for the purpose of accomplishing, **and in a manner appropriate to the accomplishment of,** the purposes for which it exists. (emphasis ours)

State v. Richards, 157 Tex. 166, 301 S.W.2d 597, 602 (1957). Article 9001 penalizes only those persons who sell the listed merchandise. There is no proscription against other merchants, tradesmen, or professional people conducting business seven days a week. There is no limitation on the use of labor on both Saturday and Sunday to manufacture the merchandise that article 9001 prohibits selling. The exceptions that we previously were willing to allow have engulfed the rule. I find no reasonable relationship between the ostensible objective of this statute and the general welfare of the people.

Although not unmindful of the argument that certain merchants who open seven days a week may act as catalysts, prompting establishments which would otherwise close on either Saturday or Sunday to continue operating through the weekend out of fear that their business will be siphoned away, I am unpersuaded. One could argue with equal force that a small store dealing exclusively in an item also carried by a large

department store may actually be encouraged to open both Saturday and Sunday. If that item is not covered by article 9001, the smaller store may have an unfair trade advantage over the larger store, which is economically prohibited from opening on Sunday to sell that item alone.

The majority seeks to justify this statute as a solution to a "legislative question." I would require that this statute, as well as any other enacted by the legislature, conform to all constitutional guarantees under accepted standards of judicial review. Although the legislature could enact a Sunday closing law that would meet constitutional requirements, article 9001 does not do so. It denies Gibson's equal protection and due process of the law under the fourteenth amendment to the United States Constitution and article I, section 19 of the Texas Constitution. Therefore, I would reverse the judgment of the trial court and render judgment for appellant.

GREENHILL, C.J., and McGEE and SAM D. JOHNSON, JJ., join in this dissent.

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1. (SETS FORTH Art. 9001. See p. 1a. for text.)
2. (Sets forth former Arts. 283, 284, 285, 286 and 287 of the Texas Penal Code. See p. 4a for text.)
3. Although article 286a § 1 (as well as the comparable provision of article 9001) is broadly applicable to "any person," § 5 exempts "occasional sales." The effect of this language is to limit coverage of the statute to those who regularly make sales of the listed goods. In the vast majority of cases these will be merchants selling in the course of their business.
4. But see **Gallagher v. Crown Kosher Super Market**, 366 U.S. 617, 81 S.Ct. 1122, 7 L. E.2d 536 (1961), upholding Massachusetts' Sunday closing law in the face of first amendment religious freedom challenges.

JUDGMENT
AND
ORDER OF TEXAS SUPREME COURT
OVERRULING MOTION FOR REHEARING

IN THE SUPREME COURT OF TEXAS

NO. B-5782 December 22, 1976

GIBSON PRODUCTS CO., INC. ET AL.

V. Direct Appeal from Dallas County

THE STATE OF TEXAS

This cause came on to be heard on direct appeal from the 162nd District Court of Dallas County, and the original transcript and briefs and arguments of Counsel having been duly considered, because it is the opinion of the Court that there was no error in the judgment of the District Court, signed and entered on the 24th day of December, 1975, it is therefore, adjudged, ordered and decreed that the order of the District Court be, and hereby is, affirmed.

It is further ordered that appellants, Gibson Products Company, Inc. et al., and their sureties, H. R. Gibson, Jr., and Winford Tunnell, pay all costs in this cause expended and incurred in this Court, and that this decision be certified to the District Court of Dallas County, Texas for observance.

(Opinion of the Court by Justice Reavley. Dissenting Opinion by Justice Doughty in which Chief Justice Greenhill and Justices McGee and Johnson join.)

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NO. B-5782 January 19, 1977

GIBSON PRODUCTS CO., INC. ET AL.

V. Direct Appeal from Dallas County

THE STATE OF TEXAS

Appellant's motion for rehearing, filed in the above numbered and entitled cause on January 5, 1977, having been duly considered, it is ordered that said motion be, and hereby is, overruled.

****

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the Seal of the Supreme Court of Texas, at the City of Austin, this, the 31st day of March, 1977.

GARSON R. JACKSON, Clerk

By: /s/ Mary M. Wakefield
MARY M. WAKEFIELD, Deputy

TEMPORARY INJUNCTION ORDER

NO. 75—12371

THE STATE OF TEXAS — IN THE 162ND
Plaintiff
VS.
GIBSON PRODUCTS COMPANY, INC. — DISTRICT COURT OF
d/b/a GIBSON's DISCOUNT CENTER, ET.AL.
Defendants — DALLAS COUNTY, TEXAS

On the 22nd and 23rd of December, 1975, came on to be heard the application by the State of Texas for a Temporary Injunction in the above styled and numbered cause; and the parties were present and announced ready for trial; and the Court heard the testimony of witnesses and arguments of counsel; and the Court found that the Defendants (1) Gibson Products Company, Inc., d/b/a Gibson's Discount Center; (2) James Smith, the manager of the above-named business; (3) Gibson Products, Inc. of Garland d/b/a Gibson's Discount Center; (4) Dwight Wilson, the manager of the immediately preceding business; (5) Gibson Products, Inc. of Richardson d/b/a Gibson's Discount Center; (6) Douglas Reagor, the manager of the immediately preceding business; (7) Gibson Products Company, Inc. of Bruton Terrace d/b/a Gibson's Discount Center; (8) G. R. McMurray, the manager of the immediately preceding business; (9) Gibson Products of Oak Cliff, Inc. d/b/a Gibson's Discount Center; (10) Charles Keenan, the manager of the immediately preceding business; (11) Gibson Discount Center Inc. of Lancaster d/b/a Gibson's Discount Center; (12) Raymond Smith, the manager of the immediately preceding business; and (13) Gene Wochner, the manager of the Gibson's Discount Center located in Grand Prairie, Texas, have engaged in the offering for sale and

selling, on both the two (2) consecutive days of Saturday and Sunday, clothing, socks, shirts, mirrors, knit caps, and such items being encompassed in Section 1 of Article 9001, V.A.C.S.

The aforesaid activity of the said Defendants was not the occasional sale of any of the said enumerated items by a person not engaged in the business of selling such items, as exempted by Section 5 of Article 9001, V.A.C.S. Furthermore, the aforesaid activity was not a sale or sales for charitable purposes, as exempted by Section 2 of Article 9001, V.A.C.S. is applicable. By the terms of Section 4 of the said Article, the aforesaid activity of the said Defendants (contrary to the provisions thereof) is a public nuisance. The Court further finds that the provisions of Article 9001, V.A.C.S. are not in contravention of the Constitution of the United States or the Constitution of the State of Texas.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that:

A. The reason for issuance of the Temporary Injunction hereby granted is that the Court finds that the said Defendants have violated Article 9001, V.A.C.S., as stated above.

B. That until final judgment herein, the Defendants, their agents, servants, employees, and any other persons acting in concert with them, shall forthwith wholly desist and refrain from offering for sale, selling, or compelling, forcing or obligating their employees to sell, on both the two (2) consecutive days of Saturday and Sunday, on the premises of any of the corporate Defendants or the Gibson's Discount Center located at 2422 South Carrier Parkway, Grand Prairie, Dallas County, Texas, the following items: clothing, clothing accessories; wearing apparel; footwear; headwear; home, business, office or outdoor furniture; kitchenware; kitchen utensils; china; home appliances; stoves; refrigerators; air conditioners; electric fans; radios; television sets; washing machines; drier; cameras; hardware; tools, excluding non-power driven hand tools; jewelry; precious or semi-

precious stones; silverware; watches; clocks; luggage; motor vehicles; musical instruments; recordings; toys, excluding items customarily sold as novelties and souvenirs; mattresses; bed coverings; household linens; floor coverings; lamps; draperies; blinds; curtains; lawn mowers or cloth piece goods.

C. That the Clerk of this Court shall forthwith issue an appropriate Temporary Injunction so providing, and any and all process proper.

ENTERED this the 24th day of December, 1975.

/s/ Dee Brown Walker
Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NO. 75-12371

THE STATE OF TEXAS	IN THE DISTRICT COURT
VS.	162ND JUDICIAL DISTRICT
GIBSON PRODUCTS COMPANY, INC. ET AL	DALLAS COUNTY, TEXAS

On December 22 and 23, 1975, came on to be heard in the above styled and numbered cause, the Order of this Court to the Defendants to appear and Show Cause, if any they had, why a Temporary Injunction should not issue restraining and enjoining them from violating Article 9001, Vernon's Annotated Civil Statutes. It appearing that two of the Defendants, Gibson Products, Inc. of Richardson and Gibson Products of Oak Cliff, Inc. plan to perfect an appeal to the Supreme Court of the State of Texas challenging the constitutionality of Art. 9001, VACS, and having by Motion duly filed requested the Court state in writing the conclusions of fact and conclusions of law relevant and material to such appeal, the Court finds the following:

FINDINGS OF FACT

1. Gibson Products, Inc. of Richardson and Gibson Products of Oak Cliff, Inc. are corporations duly organized and existing under the laws of the State of Texas. Each corporation was duly served with citation, Plaintiff's Original Petition, Order to Show Cause, and Temporary Restraining Order by service upon their repective registered agents for service.

2. Gibson Products, Inc. of Richardson through its agents, servants or employees, sold three pairs of socks to one Herb Dietsche on December 6, 1975 and on December 7, 1975, being consecutive Saturday and Sunday.

3. Gibson Products of Oak Cliff, Inc., through its agents, servants or employees, sold three pairs of socks to one Douglas Simpson on December 6, 1975 and on December 7, 1975, being consecutive Saturday and Sunday.

4. Sales of socks on the consecutive days of Saturday and Sunday are prohibited by §1, Art. 9001, VACS.

5. Gibson Products, Inc. of Richardson and Gibson Products of Oak Cliff, Inc. are regularly engaged in the business of selling socks, and the sales of socks on December 6 and 7, 1975 were not "occasional sales" as are exempt by §5, Art. 9001.

6. Net profits on the sales of items enumerated in §1, Art. 9001, VACS, by Appellants on Saturday (as computed by Gibson's Discount Centers and their certified public accountant) were donated to the March of Dimes.

7. That Gibson Products, Inc. of Richardson and Gibson Products of Oak Cliff, Inc. threatened to continue to sell socks and other items enumerated in §1, Art. 9001, VACS, on the two consecutive days of Saturday and Sunday.

8. That the Criminal District Attorney for Dallas County, Texas has secured Temporary Injunctions to enforce Art. 9001, VACS, against S. S. Kresge, d/b/a K-Mart, Bob Fenn Men's Apparel, Escue, Inc. d/b/a Gibson Discount Center (Mesquite), and the Gibson Discount Centers named in this suit, and no others, within a year of the filing of this action. Bob Fenn Men's Apparel was, at the time it was enjoined by the

District Attorney, conducting special "warehouse" type sales on Saturdays and Sundays.

9. That H. R. Gibson, Jr. presented affidavits alleging violations of Art. 9001, VACS, by 6 merchants in Dallas County, Texas, to John H. Hagler, Assistant District Attorney on December 15, 1975. These are listed on Defendants' Exhibit 7. Each of these had been contacted and had assured Mr. Hagler that they would comply with Art. 9001, VACS.

10. That H. R. Gibson, Jr. presented affidavits alleging violations of Art. 9001, VACS, by 23 merchants in Dallas County, Texas on December 12 and 13, 1975, consecutive Saturday and Sunday, to John H. Hagler, Assistant District Attorney, on December 22, 1975. These are shown on Defendants' Exhibit 8.

11. A permanent injunction against Levitz Furniture Company had been obtained by the District Attorney several years earlier.

12. That the investigators who shopped the Gibson Discount Centers named as Defendants in this lawsuit and who testified for the State of Texas were retained by Tommy Mayes, as agent for Sanger-Harris Department Store in Dallas, Texas.

13. Sanger-Harris Department Store has complied with Art. 9001, VACS.

14. That the Criminal District Attorney for Dallas County, Texas had not, as of December 23, 1975, commenced suits for injunctions against any of the merchants in Dallas County shown by affidavits presented by H. R. Gibson, Jr. to have allegedly violated Art. 9001, VACS.

15. Dale Simpson & Associates was hired by Sanger-Harris to shop Gibson's, K-Mart and Homer's. Douglas Simpson, an investigator with Dale Simpson & Associates, shopped Homer's and submitted an affidavit to the District Attorney for Dallas County concerning purchases made at Homer's.

CONCLUSIONS OF LAW

1. Gibson Products, Inc. of Richardson and Gibson Products

of Oak Cliff, Inc. were duly served with citation and appeared December 22 and 23, 1975, in response to an order to show cause why a temporary injunction should not issue.

2. The 162nd Judicial District Court has jurisdiction over Appellants and of the subject matter of this lawsuit.

3. Sales of socks on the consecutive days of Saturday and Sunday are prohibited by §1, Art. 9001, VACS, and the sale or offering for sale of socks constitutes a public nuisance **per se.**

4. The said sales of socks were not sales for charitable purposes as exempted by §2, Art. 9001, VACS.

5. That the continued sale or offering for sale by Appellants of items enumerated in §1, Art. 9001, VACS, will result in immediate and irreparable injury, loss and damage to the general public.

6. Art. 9001, VACS, is not in contravention of the Constitutions of the United States or of the State of Texas.

7. Enforcement of Art. 9001, VACS, through injunction proceedings is not contrary to the Constitutions of the United States or of the State of Texas.

The foregoing Findings of Fact and Conclusions of Law are limited to those deemed by the Court to be relevant and material to a direct appeal by Gibson Products, Inc. of Richardson and Gibson Products of Oak Cliff, Inc. to the Supreme Court of the State of Texas.

SIGNED this 9th day of January, 1976.

/s/ Dee Brown Walker
Judge

1969 TEXAS SUPREME COURT OPINION

No. B-1255.

The STATE of Texas, Appellant,
v.
SPARTAN'S INDUSTRIES, INC. et al., Appellees.

Nov. 5, 1969

REAVLEY, Justice.

The question in this case is the constitutionality of the Sunday (or Saturday) closing law, Article 286a. Vernon's Ann. Texas Penal Code. We uphold the statute.

The suit was brought by the District Attorney of Bexar County, acting in the name of the State, to enjoin four discount stores operating in Bexar County, Spartan Industries, Inc., Barker's of San Antonio, Inc., Shoppers World of San Antonio, Inc. and Globe Stores, Inc., together with certain employees, from selling certain items of merchandise on the two consecutive days of Saturday and Sunday in violation of Article 286a.The defendants attacked the constitutionality of the statute in extensive pleadings, and the trial court agreed with their arguments when the case came on for trial. No statement of facts is before us, and the briefs state that no evidence was heard by the trial court.

JURISDICTION

(1) The State has taken a direct appeal to this court under the terms of Article 1738a, Vernon's Ann.Texas Civil Statutes. A question of jurisdiction must be faced. It arises because the trial court judgment decrees "that each of the said Pleas in Abatement be and the same are hereby sustained, and that this cause be and the same is hereby dismissed * * *" This disposition of the case, if we were not to look behind the recitation, would not fit the requirement of Article 1738a,

which provides that direct appeals to this court may be taken from orders of trial courts "granting or denying an interlocutory or permanent injunction on the ground of the constitutionality or unconstitutionality of any statute * * *." Upon reading the full transcript we find that defendants' only ground for their "plea in abatement" was the unconstitutionality of the statute. The trial court gives the unconstitutionaiity of the statue as the reason for its judgment and decrees "that Plaintiff, the State of Texas, take nothing by its suit for injunctive relief against the Defendants * * *" We treat the so-called plea in abatement as a plea in bar and, since the trial court's take-nothing judgment could be the only intended judgment could be the only intended judgment, the language as to the dismissal is disregarded as meaningless. When the judgment is thus interpreted, it denied the permanent injunction sought by the State on the ground of the unconstitutionality of Article 286a, and this court has jurisdiction of the direct appeal.

This holding may be compared to the one in Touchy v. Houston Legal Foundation, 432 S.W.2d 690 (Tex.Sup.1968). In **Touchy,** the defendants filed a plea in abatement based on lack of standing of the plaintiffs to maintain the suit, and also filed a motion for summary judgment that plaintiff take nothing. The trial court heard the two pleas at the same time and rendered judgment reciting that the plea in abatement was sustained and the cause was dismissed, and further reciting that the motion for summary judgment was granted. Since the asserted ground of the plea in **Touchy** was a proper ground of abatement, we dealt with that ground and with the action of the trial court in dismissing the case. If the trial court could not have reached the merits of the case, its recitation of a ruling on the summary judgment motion had to be regarded as meaningless. In the case at hand, there was no ground for abatement and we regard the language as to abatement and dismissal as meaningless.

(2) The corporate defendants first argue that Section 1 of Article 286a prohibits consecutive day sales by "any person,"

and that this must be construed to apply only to natural persons and not to corporations. Since this question is entirely separate from any constitutional issue, we decline to consider it on the ground of the limitation of our jurisdiction in a direct appeal. Halbouty v. Railroad Commission of Texas, 163 Tex. 417, 357 S.W.2d 364 (Tex.Sup.1962).

(3) Article 286a was enacted by the Legislature in 1961. Section 4a of the statute as originally enacted permitted the sale of otherwise prohibited commodities when the purchaser certified to the seller that his need of the item was an emergency. The construction of this section brought the statute to this court in 1964 in State v. Shoppers World, Inc., Tex., 380 S.W.2d 107. The question there was whether the seller could rely on the purchaser's certificate, or whether the statute required that there be no sale in the absence of an actual emergency. The court upheld Sec. 4a by construing it not to require an objective determination by the seller. The State argues in the case before us that this court has already determined the constitutionality of Article 286a in its entirety, but the opinion makes it quite plain that the attack on Sec. 4a was the only constitutional issue considered. The defendant there had obtained certificates from its purchasers and, as the law was construed by this court, there had been no violation. The court of civil appeals had properly ruled that the State was not entitled to an injunction, and there was no cause for this court to rule further.

The Legislature removed Sec. 4a from this Article in 1967.

Citing Article I, Sections 15, 17 and 19 of the Texas Constitution, and Article XIV of the United States Constitution, appellees contend that Article 286a discriminates against them and denies them equal protection or immunity, that it denies them due process of law by virtue of vagueness or uncertainty of the prohibited act, that it takes or damages their business or property without compensation, that it authorizes the injunction of a nuisance where there is no nuisance in fact and thus denies the right to a jury trial on that issue, and that it denies them due process by prohibiting or unduly oppressing a

lawful business in a manner which has no reasonable relation to the public health and welfare. Finally, they contend that the caption of the original Act of the Legislature failed to comply with Article III, Section 35 of the Texas Constitution.

The statute has been upheld against similar attack in two of the courts of civil appeals in three opinions: Spartan Industries, Inc. v. State, 379 S.W.2d 931 (Tex.Civ.App.1964, no writ); Hill v. Gibson Discount Center, 437 S.W.2d 289 (Tex.Civ.App. 1968, writ ref. n. r. e.); State v. Sundaco, Inc., 445 S.W.2d 606 (Tex.Civ.App. 1969, writ ref. n. r. e.).

EFFECT AND OBJECTIVES OF THE STATUTE

Before weighing specific constitutional appeals against the precedents, we should understand what the Legislature has done by its enactment of Article 286a. We may as well decide at the outset whether this enactment has a reasonable relation to the public welfare. Has the Legislature arbitrarily interfered with the merchants of Texas, or can it be said that a proper objective is served by this law? Whether the statute is a legitimate exercise of the police power of the state is central to most of the questions now before us.

The full text of Article 286a is set forth in the appendix following this opinion. It specifically provides in Sec. 5a that the older Sunday closing laws are not repealed. Articles 286 and 287, Texas Penal Code, still prohibit sales, or the opening of a place of business, by any merchant and trader (subject to certain exceptions for drug stores, hotels, restaurants, etc.). The penalty for violation of Article 286 is a fine of not less than twenty nor more than fifty dollars.

Article 286a enumerates a long list of articles from clothing to motor vehicles, and gives the business man the choice of trading on either Saturday or Sunday, but provides that if he sells on both days, he may be subjected to injunction or greater penal penalty.

(4) To weigh the full effect of Article 286a we must decide whether it prohibits the sale by the same person of one or more of the named articles on Sunday when different articles, but ones named in the statute, were sold on the preceding Saturday. Thus, could a merchant close off his appliance department on Saturday and then operate on Sunday with nothing but his appliance department open? We construe the statute to prohibit this. It says that any person who sells on both days shall be guilty of a misdemeanor. Who sells **what**? Who sells "**any** clothing; clothing accessories; wearing apparel;" etc., meaning that if "any" named item is sold on one day, it is illegal to sell "any" named item on the other day. The statute does **not** say to the merchant that he may not sell clothing, or sell clothing accessories, or sell wearing apparel on consecutive days. The effect of separating each article between the semicolons and applying the prohibition only to consecutive day sales of a separate article, would be to have the Legislature permit a merchant to sell watches on Saturday and clocks on Sunday, blinds and draperies on Saturday and curtains on Sunday, washing machines and radios on Saturday and driers and television sets on Sunday. This would be a nonsensical plan to ascribe to the Legislature.

To judge the reasonableness of this statute, we have before us only the face of the statute with no evidence, but it appears there that the principal plan is to close mercantile establishments and department stores on Sunday. This is the reason for the broad list of commodities, the injunction process, and the provision in Sec. 5 that the statute applies only to those "engaged in the business of selling such item(s)." The merchant is given a choice between Saturday and Sunday, but who will choose to close on Saturday except the Sabbatarian? Defendants plead that this suit is an attempt to prevent them "from remaining open on Sundays." Surely Saturday is still the far better day for sales than is Sunday.

The most important feature of Article 286a, in practical effect, is Sec. 4 which authorizes an injunction to enforce the prohibition of the statute. Without this provision, the sanction

of Article 286 is a fine of no more than $50. That sanction is not effective for the considerations of large businesses and busy prosecutors. Defendants plead that this injunction is an attempt to prevent them "from remaining open on Sundays." Indeed, that is the effect of the statute and the intent of the injunction suit. Without Article 286a the Sunday sale of all of these commodities would be prohibited by Article 286, and the defendants would be in violation of that law were they then to engage in the activities which they would protect by appeal to the Constitution. Apparently they are not seriously troubled by the prohibitions of the law in the absence of the injunctive process.

Sunday closing laws have been attacked vigorously, both in and out of the courts, for discriminating against persons whose religion requires them to take a day of rest on some day of the week other than Sunday. McGowan v. Maryland, 366 U.S. 420, 512, 81 S.Ct. 1101, 1153, 6 L.Ed.2d 393, 448; Braunfeld v. Brown, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563; Mann and Garfinkel, The Sunday Closing Laws Decisions - A Critique, 37 Notre Dame Lawyer 323 (1962); Barron, Sunday in North America, 79 Harv.L.Rev. 42 (1965). By provision in Article 284, Texas has long permitted one to labor on Sunday if he actually observes another day of rest for religious purposes. The choice of Saturday or Sunday for the sale of the articles enumerated in the current statute should, at least, remove objections on grounds of religion made by the Sabbatarians.

Since the basis of constitutionality of Sunday closing laws has often been said to be the achievement of a single day of rest for all the family, and for the bulk of the community, it is understandable that opponents would argue that the purpose is breached by allowing merchants a choice between two days. When the question came before the Supreme Court of Michigan in Arlan's Department Stores, Inc. v. Kelley, 374 Mich. 70, 130 N.W.2d 892 (1964), three justices found this feature fatal to the statute and three justices upheld it in this respect. The Supreme Court of Minnesota in State v. Target Stores, Inc., 279 Minn. 447, 156 N.W.2d 908 (1968), found no

constitutional defect here, but only "a legislative attempt to alleviate the indirect religious burden upon Sabbatarians."

(5) The objective of one day a week surcease from commerce is served by this statute. That surcease has never been unanimous, for exceptions are always allowed. The Legislature was entitled to expect that Article 286a would yield Sunday operations only by Sabbatarians and perhaps an occasional small Storekeeper.

EQUAL PROTECTION

(6) Defendants argue that they are the victims of discrimination, and are denied equal protection of the law, because the statute raises the penalty and threatens an injunction only against those who are in the business of selling the particularly enumerated articles. This same argument was put forward and answered in Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 589, 81 S.Ct. 1135, 6 L.Ed.2d 551, 557. The Pennsylvania statute under consideration imposed a higher penalty for the Sunday sale of named commodities, which were almost exactly the same as those named in Article 286a. The U. S. District Court had found that substantial surburban retail businesses had triggered large scale violations of the Pennsylvania general Sunday closing law, and that the small fine of the older law "was inadequate to deter the Sunday opening of large retail establishments which could easily absorb such small fines as an incidental cost of doing a profitable business. Moreover, it appeared that the types of commodities covered by this new enactment are principal categories of merchandise sold in these establishments which have made the problem of Sunday retail selling newly acute." The Supreme Court held that it was within the power of the state legislature to have concluded that these businesses were particularly disrupting and that their violation of the law was of a different dimension, requiring a different remedy. Mr. Justice Frankfurter, in his concurring opinion, upholds the statute because "it singles out the area where a danger has been made most evident, and within that

area treats all business enterprises equally. That in so doing it may have drawn the line between the sale of a sofa cover, punished by a hundred-dollar fine, and the sale of an automobile seat cover, punished by a four dollar fine, is not sufficient to void the legislation." 366 U.S. 541, 81 S.Ct. 1197, 6 L.Ed.2d 465.

The Supreme Court of North Carolina upheld an ordinance which forbade the sale of enumerated commodities very similar to those of Article 286a, saying: "It is both reasonable and practical to require people to do their serious shopping for clothing, furniture, automobiles, household and office appliances, hardware, and building supplies on weekdays." Charles Stores Company, Inc. v Tucker, 263 N.C. 710, 140 S.E.2d 370 (1965).

Courts have on occasion invalidated statutes of this nature by doing as the defendants have done in their briefs, holding up the prohibition against the sale of a camera as against the absence of such a prohibition against the sale of camera film and calling for a showing of a distinction related to a day of rest or the public welfare. However, the clear majority of the cases uphold statutes against such attack so long as the statutory scheme, viewed as a whole, is a valid one and so long as it treats all merchants alike without discriminating among competitors. If no one is allowed to sell automobiles, for example, the law is not regarded as discriminatory. Anno.: Validity of Discrimination by Sunday Law Between Different Kinds of Stores or Commodities, 57 A.L.R.2d 975.

In Watts v. Mann 187 S.W.2d 917 (Tex.Civ.App.1945, writ ref'd), the court had before it the constitutionality of Article 4646b, Vernon's Ann.Civ.St., which authorized an injunction against one who made three usurious loans within a period of six months. It was there argued that the law discriminated in favor of usurers who made fewer loans. The court held that it was entirely proper for the Legislature to treat the more serious threat to the law differently from the casual violation. It was pointed out that the pleading of the lenders themselves showed that prior usury laws were ineffective as to the operations of

those lenders and that the injunction law was essential. The same can be said of the case at hand, where defendants plead that the public wants to buy from them on Sunday and will be served if the court does not interfere.

VAGUENESS

(7) The defendants say that the prohibited commodities are set forth in terms so vague and indefinite as to render the statute unconstitutional. Constitutional due process requires that the prohibition of a penal statute must be understandable to a person of common intelligence. Defendants argue that the descriptions of commodities in this statute are so uncertain that the merchant who wants to comply with the law cannot know how to do so. However, virtually all of these terms are common words which will be understood by any merchant. It a marginal or questionable case could be posed for the application of the word "hardware," for example, this would be no ground for vitiating an entire legislative enactment. United States v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947); Jordon v. De George, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951).

(8) Various types of Sunday closing laws in many states for many years have prohibited sales by the use of words very similar to those used in Article 286a. They have been upheld against attack for vagueness. Charles Stores Company, Inc. v. Tucker, 263 NC 710, 140 S.E.2d 370 (1965); State v. Solomon, 245 S.C. 550, 141 S.E.2d 818, 14 A.L.R.3d 1277 (1965); State ex rel. Eagleton v. McQueen, 378 S.W.2d 449 (Mo.Sup.Ct.1964); Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 81 S.Ct.1135; 6 L.Ed.2d 551; Anno.: Validity of Sunday Law or Ordinance as Affected by Vagueness, 91 A.L.R.2d 763.

POLICE POWER

(9) The defendants also contend that Article 286a, by interfering with their lawful business, takes their property without compensation, declares a nuisance where there is

none, and deprives them of property without due process of law. These contentions are without merit if the statute is a valid exercise of the police power of the state. The Constitution does not require that compensation be paid for loss occasioned by the exercise of the police power. State v. Richards, 157 Tex. 166, 301 S.W.2d 597 (1957).

(10,11) It is true that the Legislature may not validly declare something to be a nuisance which is not so in fact, but that depends upon the question of whether that which is declared to be a nuisance endangers the public health, public safety, public welfare, or offends the public morals. In Ex Parte Hughes, 133 Tex. 505, 129 S.W.2d 270 (1939), the Supreme Court held that no injunction could be granted to stop the relator from collecting usury, since the laws of the state did not then define usury as a nuisance, either public or private. The Legislature then enacted a special statute against usurious lending and provided for an injunction for its enforcement. The statutory injunction was upheld in Watts v. Mann, 187 S.W.2d 917 (Tex.Civ.App.1945, writ ref'd). If the Legislature may prohibit an act, it may authorize an injunction against that act.

(12, 13) Thus we are brought back to the question of the police power of the state, which turns upon the question of whether there is a reasonable relation between Article 286a and the health, recreation and welfare of the people of the state. If is not the function of the courts to judge the wisdom of a legislative enactment. It is only when a statute arbitrarily interferes with legitimate activities in such a manner as to have no reasonable relation to the general welfare, that this court may rule the statute to be unconstitutional on the grounds with which we are here concerned. With the long precedent for the constitutionality of Sunday closing laws in this State, and with the view we take of this statute as set forth above, we hold it to be validly related to the health, recreation and welfare of the people.

CAPTION

(14, 15) Defendants say that Article III, Sec. 35 of the Texas

Constitution, which requires that the subject of an Act be expressed in its title, is violated in the caption of Article 286a for this reason: the caption says that the subject of the Act is to prescribe one list of items which may not be sold on Saturday and another list of items which may not be sold on Sunday. This is an unlikely construction of the caption. The caption need only state the general subject of the Act; it need not explain the details.

Holding Article 286a to be constitutional against the attacks here made upon it, we reverse the judgment of the trial court and remand the cause to that court for further proceedings.

CALVERT, C. J., and SMITH and GREENHILL, JJ., dissent.

APPENDIX

(NOTE: At this point the Court reproduced the text of Art. 286a which may be found herein at App. A, pp. 5a).

CALVERT, Chief Justice (dissenting).

Any objective evaluation of the constitutionality of Art. 286a[1] should proceed from the incontrovertible premise that the statute is not, as most people are inclined to think, a "Sunday closing law", or even, as the majority of this court has characterized it, a "Sunday (or Saturday) closing law". Rather, as will be demonstrated, it is a "Sunday Opening law".

Any suggestion that Art. 286a is a "Sunday closing law", or a "Sunday (or Saturday) closing law", either overlooks or ignores the fact that, by virtue of the statute's provisions, stores in which only the forty-six items or categories of merchandise listed in section 1 are sold or offered for sale may open and engage in business on Sunday under sanction of law for the first time in one hundred years! Moreover, before the enactment of Art. 286a, the opening and operation of such stores and the sale of the listed merchandise on Sunday was

absolutely prohibited by Arts. 283 and 286; and but for the enactment of Art. 286a operation of such stores and sale of the listed merchandise on Sunday would still be prohibited by Arts. 283 and 286. And if, as the majority opinion suggests, the sanctions provided in Arts. 283 and 286 were inadequate and "not effective for the considerations of large businesses and busy prosecutors," thus dictating a need for injunctive process, that sanction could easily have been added by the Legislature for enforcement of the existing Sunday closing without the necessity of enacting a Sunday opening law.

INCIDENTAL QUESTIONS

Before writing at some length on my main point of disagreement with the majority, perhaps I should indicate certain incidental points of agreement and disagreement.

I agree with the holding that the pleas of unconstitutionality were pleas in bar and not pleas in abatement, and that the judgment of dismissal was, therefore, improper, and may be treated as meaningless. Texas Highway Department v. Jarrell, 418 S.W.2d (Tex.Sup.1967); Kelley v. Bluff Creek Oil Co., 158 Tex. 180, 309 S.W.2d 208 (1958); 1 Tex.Jur.2d 19-23, Abatement and Revival §§ 3-5. I agree that Rule 71, Texas Rules of Civil Procedure, authorizes us to treat the pleas in abatement as pleas in bar; that the take-nothing judgment may be considered as the only proper judgment, and that we have jurisdiction of the direct appeal.

I agree that we do not have jurisdiction to decide whether section 1 of Art. 286a is applicable only to "persons" or whether it is applicable also to corporations.

I agree that the constitutionality of Art. 286a was not decided in State v Shoppers World, Inc., 380 S.W.2d 107 (Tex.Sup.1964). To the contrary, the opinion in that case indicates painstaking care that our decision concerned only a proper construction of Section 4a, since repealed.

I disagree with the majority's interpretation of Section 1 of Art. 286a. The majority has interpreted the section to mean

that if **one**[2] of the enumerated articles of merchandise is sold on Saturday, the merchant is not only prohibited from selling that article on Sunday but is prohibited also from selling on Sunday any of the other forty-five items or categories of items. I suggest that the majority interpretation is not the proper grammatical interpretation of the section. The section provides that "(a)ny person, on both the two (2) consecutive days of Saturday and Sunday, who sells or offers for sale * * any clothing) clothing accessories; * * lawn mowers or cloth piece goods shall be guilty of a misdemeanor." Use of the words "any" and "or" require, in the absence of something indicating a different legislative intent, that the section be interpreted to read as follows: "Any person who sells **any** clothing on the consecutive days of Saturday and Sunday; **or any** clothing accessories on the consecutive days of Saturday and Sunday; **or any** lawn mowers on the consecutive days of Saturday and Sunday * * *" The fact that the various items are separated by semi-colons rather than by commas does not alter the rule, and I find nothing in the section supporting the majority finding of a different legislative intent. It hardly makes sense to find that the Legislature thought that a seller of motor vehicles on Saturday might sell bed coverings or household linens on Sunday and that he should be punished if he did. If the Legislature had intended to make a person selling one of the items on Saturday subject to penalties if he sold another on Sunday, it could have so provided in very simple language.

DUE PROCESS

As is apparent from the majority opinion, appellees attack the constitutionality of Art. 286a on a number of grounds. If any one of the grounds of attack is sound, the trial court's take-nothing judgment is correct and should be affirmed. In my opinion the statute is unconstitutional because it operates to deprive appellees of their property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States and of § 19, Art. I, Constitution of Texas.

Persons engaged in selling the items of merchandise listed in section 1, Art, 286a, are engaged in a legitimate activity, and a legislative prohibition of the sale of such items, or limitation on the right to sell them, can only be squared with constitutional due process if it is a legitimate exercise of the police power. The legislative prohibition or limitation contained in the statute does not represent a proper exercise of the police power unless there is a reasonable relationship between its proscriptions and the protection of the public health, safety, morals or general welfare. Standards for determining whether such a relationship exists are anything but precise. We summarized them in State v. Richards, 157 Tex. 166, 301 S.W.2d 597, at 602 (1957) in these words:

> "The line where the police power of the state encounters the barrier of substantive due process is not susceptible of exact definition. As a general rule the power is commensurate with, but does not exceed, the duty to provide for the real needs of the people in their health, safety, comfort and convenience as consistently as may be with private property rights. The guarantee of due process does not deprive the state of the right to take private property by the exercise of such power in a proper and lawful manner, but it is essential that the power be used for the purpose of accomplishing, **and in a manner appropriate to the accomplishment of,** the purposes for which it exists. * * *"

Section 4 of Art. 286a declares that the Act's purpose is "to promote the health, recreation and welfare of the people of this state". But, the legislative declaration that the Act's **purpose** is to promote the health, recreation and welfare of the people is not enough; it must appear that there is a reasonable basis for a legislative conclusion that the proscriptions contained in the Act **will in fact** promote or protect the health, recreation and welfare of the people.

"* * * (T)he cases are in complete accord in holding that a mere assertion by the legislature that a statute relates to the public health, safety, or welfare does not of itself bring such statute within the police power of a state. Governmental action does

not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of the legislation in question. Hence, in the exercise of such power, the legislature cannot, by its mere fiat, make that reasonable which is indisputably unreasonable." 16 Am.Jur.2d 546, Constitutional Law § 281. If the rule were otherwise, "it would always be within legislative power to disregard the constitutional provisions giving protection to the individual." Houston & T.C.R. Co. v City of Dallas, 98 Tex. 396, 84 S.W. 648 at 653 (1905). The Legislature has "(a) large discretion * * * to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests," State v. Richards, supra; "(b)ut a state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. * * * Constitutional protections having been invoked, it is the duty of the court to determine whether the challenged provision has reasonable relation to the protection of purchasers (the public) * * * and really tends to accomplish the purpose for which it was enacted." Jay Burns Baking Co. v. Bryan, 264 U.S. 504, at 513, 44 S.Ct. 412, at 413, 68 L.Ed. 813, 32 A.L.R. 661 (1924).

In the forepart of this opinion I said that Art. 286a was a Sunday opening law rather than a Sunday closing law. Actually, of course, the statute does not speak to the opening or closing of mercantile establishments; it speaks only to the sale or offers for sale of the forty-six items or categories of merchandise. What possible relationship the sale or non-sale of the particular items of merchandise on the consecutive days of Saturday and Sunday can have to the public health, morals, recreation or welfare is not suggested by the State; and I have been unable to conjure up a reasonable relationship in my own mind. I judicially notice, as a matter of common knowledge, that drug stores and grocery stores, which are legally open on the consecutive days of Saturday and Sunday, sell and offer for sale a large number of the listed items on both days; and

prohibition of the sale of such items on the two consecutive days does not by law require the closing of such stores. The utter incongruity of an effort to relate the provisions of Art. 286a to protection of public health, recreation, or welfare is so patent as to be inescapable. Most modern drug stores sell hand mirrors, clocks and flashlights. Mirrors and clocks are listed in section 1; flashlights are not. Is a flashlight "hardware", and thus included in the list of items which may not be sold or offered for sale on the consecutive days of Saturday and Sunday? If it is, how has the public health, morals, recreation or welfare been benefited by a statute which, because he sold a flashlight on Saturday, prohibits the merchant from selling a mirror or clock, or even another flashlight, on Sunday? Being uncertain myself of the relationship between the proscriptions of Art. 286a and the health, recreation and welfare of the people, which may have been in the legislative mind, I turned for assistance to the brief filed in this court on behalf of the State. I found there only this relevant statement:

> "Obviously, Article 286a, Texas Penal Code, relates to many things for the good of the public generally. The act is calculated to decrease the number of mercantile establishments that remain open both Saturday and Sunday, thus relieving traffic congestion and affording more families a day for family recreation and other activity when all family members can be present. Thus by reducing traffic congestion affording families an opportunity to relax together at a common time the public health, welfare and recreation is benefited. This brief will not be lengthened by reciting the many public benefits Article 286a, Texas Penal Code is is calculated to give the public generally."

Laws which reduce traffic congestion and laws which afford family members an opportunity to relax together at a common time undoubtedly have a reasonable relationship to public health, recreation and welfare; but, can it reasonably be said that Art. 286a will do either of these things?

The State's argument of public benefits is premised upon the statement that "(t)he act is calculated to decrease the number of mercantile establishments that remain open on both Saturday and Sunday * * *." The premise seems clearly to be false. Under the law as it existed at the time Art. 286a was enacted, no stores which dealt solely in some or all of the merchandise listed in section 1 could legally be open for business on Sunday. Art. 283 prohibited labor in the stores and Art. 286 prohibited any merchant or dealer in the merchandise from permitting his place of business "to be open for the purpose of traffic." If we assume that, with Art. 286a in effect, those persons who deal solely in some or all of the listed merchandise, and those persons who could not operate their places of business profitably on both days without selling some of the listed items of merchandise, would be forced by economic necessity to keep their places of business closed on either Saturday or Sunday, perhaps we could reasonably conclude that the Act is calculated to reduce the number of mercantile establishments which remain open on Saturday. Quite obviously, however, it is calculated to increase the number of establishments which remain open on Sunday, since, prior to Art. 286a, none was legally open on Sunday. The question thus posed by the State's argument is whether an Act authorizing Sunday operation of business establishments which, theretofore, were legally open only on Saturday, is calculated to reduce traffic congestion and to afford more family members a common time of relaxation. I think not.

Before enactment of Art. 286a, weekend shoppers for any one or more of the forty-six items listed in section 1 were required to do their shopping on Saturday and had a choice of shopping at any store dealing in the listed merchandise. A decrease in the number of stores open on Saturday may be calculated to relieve traffic congestion on that day at those points where stores are closed, but it is most assuredly calculated to increase traffic congestion on Saturday at those points where stores choose to remain open on that day. Moreover, the mere closing on Saturday and opening on

Sunday of some of the affected stores is calculated to create traffic congestion on Sunday in areas where none has existed before on that day. Finally, the closing on Saturday and opening on Sunday of some of the affected stores is calculated to increase Sunday traffic congestion, more than proportionately, by bringing once again into the stream of traffic all of those shoppers who did not find merchandise to their liking, at prices to their liking, on Saturday. In so far as traffic congestion is concerned, the statute is thus calculated to have an effect of aggravating the evil it allegedly corrects. Perhaps the best evidence that the State's traffic-reduction argument is without merit is that the majority of this court has declined to embrace or approve it.

The idea that the statute is calculated to afford more family members an opportunity to relax together at a common time seems altogether fanciful. The same argument has been universally used by courts to support and sustain the validity of Sunday closing laws—they provide a common day of rest when all family members can come together for relaxation and recreation. It is difficult to see how the argument can now be used to support and sustain a Sunday opening law which is calculated to result in some members of families working on Saturday and resting on Sunday while other members rest on Saturday and work on Sunday. The practical effect of the statute in this respect appears to be just the reverse of its stated purpose.

Just as with the traffic-reduction argument, the majority has also declined to embrace or approve the State's common-day-of-rest argument. Indeed, the majority has rejected as applicable here the common day-of-rest philosophy, so eloquently pervading the majority and concurring opinions in the four 1961 Supreme Court Sunday closing law cases. Instead, the majority has invented a "one-day-a-week-surcease-from-commerce" philosophy, and suggests that the due process attack is without validity because the new philosophy should be more satisfactory to Sabbatarians. Relief of religious burdens may avoid complaints by Sabatarians on

religious grounds, but I am at a loss to understand how relief of such burdens can create a resonable relation between the statute's proscriptions and the public health, recreation and welfare. I will examine this matter in somewhat greater depth in analyzing the 1961 Supreme Court cases.

As requiring a different result from the one I have reached, the State has relied primarily upon four cases decided by the Supreme Court of the United States, to wit(McGowan v Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); Gallagher v. Crown Kosher Super Market, 366 U.S. 617, 81 S. Ct. 1122, 6 L. Ed.2d 536 (1961); Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582, 81 S.Ct. 1135, 6 L. Ed.2d 551 (1961); Braunfield v Brown, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961). The first case involved the validity of the Maryland Sunday laws. They proscribed all labor, business and other commercial activities on Sunday, with certain exceptions such as sale of foods, drugs, newspapers and gasoline, and certain other exceptions in particular localities. In the second case, the Court considered the validity of the Massachusetts Sunday laws which forbid the keeping open of shops and the doing of any labor, business or work on Sunday, with certain exceptions. A Pennsylvania law was under attack in the last two cases. It provides that whoever shall sell on Sunday certain items of merchandise shall be subject to a fine. The items listed are almost identical with some of those listed in section 1 of Art. 286a. The Supreme Court upheld the validity of the statutes of the three states against almost every conceivable constitutional attack, including violation of due process. It is to be noted, however, that the Maryland and Massachusetts statutes of the three states against almost every conceivable constitutional attack, including violation of due process. It is to be noted, however, that the Maryland and Massachusetts statutes are true Sunday closing laws, comparable to the Texas statutes before enactment of Art. 286a, and that the Pennsylvania statute was considered as having the effect of a Sunday closing law. Notice should be taken at this point that crucial to the Court's

decisions was the common-day-of-rest philosophy. This, said the Court over and over again, was the sustainable **purpose** of the various laws.

In McGowan v. Maryland, supra, the Court said:

"The present purpose and effect of most of them (Sunday Closing laws) **is to provide a uniform day of rest for all citizens * * *.**" 366 U.S., at 445, 81 S.Ct., at 1115.

"* * * It is true that **if the State's interest were simply to provide for its citizens a periodic respite from work,** a regulation demanding that everyone rest one day in seven, leaving the choice of the day to the individual, would suffice.

"However, the State's purpose is not merely to provide a one-day-in-seven work stoppage. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility—a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days." 366 U.S., at 450, 81 S.Ct., at 1118.

"Obviously, a State is empowered to determine that a rest-one-day-in-seven statute would not accomplish this purpose; that it would not provide for a general cessation of activity, a special atmosphere of tranquility,a day which all members of the family or friends and relatives might spend together. Furthermore, it seems plain that the problems involved in enforcing such a provision would be exceedingly more difficult than those in enforcing a common-day-of-rest provision.

"Moreover, it is common knowledge that the first day of the week has come to have special significance as a rest day

in this country. People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like. * *'' 366 U.S., at 451, S. Ct., at 1118.

If the Supreme Court of the United States has correctly stated the purpose of laws requiring the closing of mercantile establishments on one day a week, that purpose can be served only by laws which require closing on Sunday; it cannot be served by laws which give a merchant a choice of closing on **any** day of the week or on **another specific day** of the week. It follows that the proscriptions of Art. 286a have no reasonable relation to the health, recreation or welfare of the people; and, therefore, that the Article is an arbitrary exercise of the police power, and should be declared unconstitutional.

SMITH and GREENHILL, JJ., join in this dissent.

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1. All Article references are to Vernon's Texas Penal Code.
2. Emphasis mine throughout unless otherwise indicated.

APPENDIX C

RELEVANT PLEADINGS

PLAINTIFF'S ORIGINAL PETITION
NO. 75-12371

THE STATE OF TEXAS	IN THE 162ND
Plaintiff	
VS.	
GIBSON PRODUCTS COMPANY, INC. d/b/a GIBSON'S DISCOUNT CENTER, et. al.	DISTRICT COURT OF
Defendants	DALLAS COUNTY, TEXAS

NOW COMES the State of Texas, acting by and through its Criminal District Attorney, Henry Wade, hereinafter referred to as Plaintiff, complaining of (1) Gibson Products Company, Inc., d/b/a Gibson's Discount Center; (2) James Smith, the manager of the above-named business; (3) Gibson Products, Inc. of Garland d/b/a Gibson's Discount Center; (4) Dwight Wilson, the manager of the immediately preceding business; (5) Gibson Products, Inc. of Richardson d/b/a Gibson's Discount Center;(6) Douglas Reagor, the manager of the immediately preceding business; (7) Gibson Products Company, Inc. of Bruton Terrace d/b/a Gibson's Discount Center; (8) G. M. McMurray, the manager of the immediately preceding business; (9) Gibson Products of Oak Cliff, Inc. d/b/a Gibson's Discount Center; (10) Charles Keenan, the manager of the immediately preceding business; (11) Gibson Discount Center Inc. of Lancaster d/b/a Gibson's Discount Center; (12) Raymond Smith, the manager of the immediately preceding business; (13) Gibson Products Co., Inc. of Grand Prairie d/b/a Gibson's Discount Center; and, (14) Gene Wochner, the manager of the immediately preceding business, all of whom are hereinafter referred to as Defendants, and for

cause of action would respectfully show to the Court the following:

I.

That this suit for injunctive relief is brought by the Criminal District Attorney of Dallas County, Texas, in the name of the State of Texas and in the public interest under the authority granted by Article 9001, Vernon's Texas Civil Statutes.

II.

That the said Defendants Gibson Product Company, Inc. d/b/a Gibson's Discount Center; Gibson Product, Inc. of Garland d/b/a Gibson's Discount Center; Gibson Product, Inc. of Richardson d/b/a Gibson's Discount Center; and Gibson Products Company, Inc. of Bruton Terrace d/b/a Gibson's Discount Center are corporations that conduct business in Dallas County, Texas, and may be served with process by serving their registered agent for service H. R. Gibson, Jr., 519 Gibson Street, Seagoville, Texas, 75159.

That the said Defendant Gibson Products of Oak Cliff, Inc. d/b/a Gibson's Discount Center is a corporation that conducts business in Dallas County, Texas, and may be served with process by serving their registered agent for service Mr. George Nokes, 5212 Lake Jackson Drive, Waco, Texas.

That the said Defendant Gibson Discount Center, Inc. of Lancaster d/b/a Gibson's Discount Center is a corporation that conducts business in Dallas County, Texas, and may be served with process by serving their registered agent for service Mr. Fred Mandrell, 114 South Center, Lancaster, Texas.

That the said Defendants Gibson Products Co. of Grand Prairie d/b/a Gibson's Discount Center is a corporation that conducts business in Dallas County, Texas, and may be served with process by serving the store manager Gene Wochner at the Gibson's Discount Center, 2422 South Carrier Parkway, Grand Prairie, Texas. That the said Defendant Gene Wochner may likewise be served at that address.

That the said Defendant James Smith may be served with process at the Gibson's Discount Center, 1228 E. Ledbetter Drive, Dallas, Texas.

That the said Defendant Dwight Wilson may be served with process at the Gibson's Discount Center, 401 Walnut Plaza Shopping Center, Garland, Texas.

That the said Defendant Douglas Reagor may be served with process at the Gibson's Discount Center, 520 West Arapaho, Richardson, Texas.

That the said Defendant G.M. McMurray may be served with process at the Gibson's Discount Center, 2233 Prairie Creek Road, Dallas, Texas.

That the said Defendant Charles Keenan may be served with process at the Gibson's Discount Center, 2929 South Westmoreland, Dallas, Texas.

That the said Defendant Raymond Smith may be served with process at the Gibson's Discount Center, 114 South Centre, Lancaster, Texas.

III.

That at the times mentioned herein the above-named corporate Defendants have operated stores for the sale of merchandise to the public. That at such times mentioned herein, the other named Defendants were the managers of such stores, as set out above.

IV.

That the Defendants have unlawfully offered for sale and have sold some of those items enumerated in Section 1 of Article 9001, V.A.C.S., on the two (2) consecutive days of Saturday and Sunday.

V.

That the said Defendants threaten to continue and do continue to unlawfully sell some of those items enumerated in Section 1 of Article 9001, V.A.C.S., on the two (2) consecutive days of Saturday and Sunday.

VI.

Alternatively, that the Defendants have compelled, forced, and obliged their employees to sell some of those items enumerated in Section 1 of Article 9001, V.A.C.S., on the two (2) consecutive days of Saturday and Sunday and that the Defendants continue to do so.

VII.

That the affidavits of Douglas A. Simpson, Don Schonhoff, and Herbert Allan Dietsche are attached and incorporated into this petition for all purposes.

VIII.

That the Defendants so violated and threatened to continue to so violate the said provisions of Article 9001, V.A.C.S. That the Plaintiff's remedy at law is inadequate to prevent the threatened harm and danger. That the purpose of the said Article is to promote the health, recreation, and welfare of the people of the State of Texas; that, unless the Defendants are restrained and enjoined from such unlawful conduct, immediate and irreparable injury, loss, and damage will result to the general public and will occur before notice can be served and a hearing had thereon; furthermore, the actions of the said Defendants in threatening to violate and in continuing to violate the said provisions of Article 9001, V.A.C.S., have created a public nuisance. By the terms of Section 4 of the Said Article, the operation of any business contrary to the provisions thereof is a public nuisance and an injunction may be issued restraining such illegal operations.

WHEREFORE, PREMISES CONSIDERED, the Plaintiff prays for the following relief:

A. That this Court forthwith grant a Temporary Restraining Order and thereafter a Temporary Injunction, and thereafter a Permanent Injunction commanding the Defendants, and their

officers, agents, employees, and persons in active concert or participation with them, all and each, to wholly desist and refrain from offering for sale, selling, or compelling, forcing, or obligating their employees to sell, on both the two (2) consecutive days of Saturday and Sunday, the following items: clothing, clothing accessories; wearing apparel, footwear; head-wear; home, business office or outdoor furniture; kitchenware; kitchen utensils; china; home appliances; stoves; refrigerators; air conditioners; electric fans; radios; television sets) washing machines; driers; cameras; hardware; tools, excluding non-power driven hand tools; jewelry; precious or semi-precious stones; silverware; watches; clocks; luggage; motor vehicles; musical instruments; recordings; toys, excluding items customarily sold as novelties and souvenirs; mattresses; bed coverings; household linens; floor coverings; lamps; draperies; blinds; curtains; mirrors; lawn mowers or cloth piece goods.

B. That the Plaintiff have judgment herein that Plaintiff recover all costs herein from Defendants and each of them, and for any and all relief, both special and general either in law or in equity to which Plaintiff may be justly entitled.

HENRY WADE
CRIMINAL DISTRICT ATTORNEY
DALLAS COUNTY, TEXAS

By: /s/ John H. Hagler
JOHN H. HAGLER
ASSISTANT DISTRICT ATTORNEY
DALLAS COUNTY, TEXAS

AFFIDAVIT IN ANY FACT

THE STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, Sharon Sanders

a Notary Public in and for said County, State of Texas on this day personally appeared Don Schonhoff , who, after being by me duly sworn, on oath deposes and says:

My name is Don Schonhoff. I am over 21 years of age, of sound mind, capable of making this affidavit, competent to testify to matters stated herein; and am personally acquainted with the facts herein stated and know such facts to be true and correct.

On Saturday, 6 December 1975, I went to the Gibson's Discount Center, 401 Walnut Plaza, City of Garland, Dallas County, Texas. This store was open to the public and conducting business at that time, I personally observed customers buying merchandise in the store. I personally purchased some clothing, namely: two pair of sport socks, from the cashier in that store.

On the following Sunday, 7 December 1975, I returned to the same store in Garland and personally observed that the store was again open to the public and conducting business at that time. I entered the store and personally purchased some clothing, namely: one pair of sport socks from a cashier in that store.

* * * * * *

On Saturday, 6 December 1975, I went to the Gibson's Discount Center 2233 Prairie Creek, Bruton Terrace Shopping Center, City of Dallas, Dallas County, Texas. This store was open to the public and conducting business at that time. I personally observed customers buying merchandise in the store. I personally purchased some clothing, namely: two pair of sport socks, from a cashier in that store.

On the following day, Sunday, 7 December 1975, I returned to the above-named store in the Bruton Terrace Shopping Center and personally observed that the store was again open to the public and conducting business. I entered the store and personally purchased some clothing, namely: two pair of sport socks, from a cashier in that store.

/s/ Don Schonoff

SUBSCRIBED AND SWORN TO BEFORE ME this 8th day of December A.D. 1975.

/s/ Sharon Sanders
Notary Public in and for
Dallas County, Texas

AFFIDAVIT

THE STATE OF TEXAS

BEFORE ME, SHARON SANDERS

COUNTY OF DALLAS

a Notary Public in and for said County, State of Texas, on this day personally appeared Douglas A. Simpson, who, after being by me duly sworn, on oath deposes and says:

My name is Douglas A. Simpson; I am over 21 years of age, of sound mind, capable of making this affidavit, competent to testify to matters stated herein; and am personally acquainted with the facts herein stated and know such facts to be true and correct.

On Saturday, 6 December, 1975, I went to the Gibson's Discount Center, 2929 S. Westmoreland, City of Dallas, Dallas County, Texas. The store was open to the public and conducting business at that time. I personally observed customers purchasing various items in the store. I personally purchased headwear, namely a cap, and also some clothing, namely three pairs of socks. These purchases were made from cashiers in the store.

On the following day, Sunday, 7 December, 1975, I returned to the same store and personally observed that the store was again open to the public and conducting business at that time. I personally purchased headwear, namely a cap, and also some clothing, namely three pairs of socks. These purchases were made from a cashier in the store.

* * * * * *

On Saturday, 6 December, 1975, I went to the Gibson's Discount Center, 114 S. Centre, City of Lancaster, Dallas County, Texas. The store was open to the public and conducting business at that time. I personally purchased a mirror from a cashier in the store.

On the following day, Sunday, 7 December, 1975, I returned to the same store in Lancaster and personally observed that the store was again open to the public and conducting business at that time. I personally purchased a mirror from a cashier in that store.

*****

On Saturday, 6 December, 1975, I went to the Gibson's Discount Center, 1228 E. Ledbetter, City of Dallas, Dallas County, Texas. I personally observed that the store was open to the public and conducting business at that time. I personally purchased some clothing, namely a pair of socks and a work shirt, from a cashier in that store.

On the following day, 7 December, 1975, I returned to the same store at 1228 E. Ledbetter, City of Dallas. I personally observed that the store was again open to the public and conducting business at that time. I personally purchased some clothing, namely a pair of socks and a work shirt, from a cashier in that store.

/s/ Douglas A. Simpson

SUBSCRIBED AND SWORN TO BEFORE ME this 9th day of December, A.D., 1975.

/s/ Sharon Sanders
Notary Public,
Dallas County, Texas

AFFIDAVIT

THE STATE OF TEXAS

COUNTY OF DALLAS **BEFORE ME, Ranna Caldwell**

a Notary Public in and for said County, State of Texas, on this day personally appeared Herbert Allan Dietsche, who, after being by me duly sworn, on oath deposes and says:

My name is Herbert Allan Dietsche; I am over 21 years of age, of sound mind, capable of making this affidavit, competent to testify to matters stated herein; and am personally acquainted with the facts herein stated and know such facts to be true and correct.

On Saturday, 6 December 1975, I went to the Gibson's Discount Center, 520 W. Arapaho, City of Richardson, Dallas County, Texas. The store was open to the public and conducting business at that time. I personally observed customers purchasing various items in the store. I personally purchased some clothing, namely six pairs of white socks. These purchases were made from cashiers in that store.

On the following day, Sunday, 7 December 1975, I returned to the same store and personally observed that the store was again open to the public and conducting business at that time. I personally purchased clothing, namely three pairs of white socks. These purchases were made from a cashier in the store.

* * *

On Saturday, 6 December 1975, I went to the Gibson's Discount Center, 2422 S. Carrier Parkway, City of Grand Prairie, Dallas County, Texas. The store was open to the public and conducting business at that time. I personally observed other customers purchasing various items in the store. I personally observed other customers purchasing various items in the store. I personally purchased some clothing, namely a pair of white socks and a knit cap. These purchases were made from cashiers in that store.

On the following day, Sunday, 7 December 1975, I returned to the same store in Grand Prairie and personally observed that the store was again open to the public and conducting business at that time. I personally purchased some headwear, namely a knit cap, from a cashier in that store.

/s/ HERBERT A DIETSCHE

SUBSCRIBED AND SWORN TO BEFORE ME this 9 day of December, A.D., 1975.

/s/ RANNA CALDWELL
Notary Public,
Dallas County, Texas

MOTION TO DISSOLVE
TEMPORARY RESTRAINING ORDER

NO. 75-12371-I

THE STATE OF TEXAS In the 162nd

VS. Judicial District Court

GIBSON PRODUCTS COMPANY, INC.
ET AL Dallas, County Texas

Now come Gibson Products Company, Inc., Gibson Products, Inc. of Garland, Gibson Products, Inc. of Richardson, and Gibson Products Company, Inc. of Bruton Terrace, named Defendants in the above styled and numbered cause, and present this, their Motion To Dissolve Temporary Restraining Order, and would show the Court:

1. From the face of the Citation and Temporary Restraining Order served on Defendant, it appears that the Temporary

Restraining Order was issued before Plaintiff's Original Petition was filed. Thus, the Order was filed in an improper manner.

2. Plaintiff's Original Petition is not verified by the affidavit of Henry Wade, Criminal District Attorney, as required by Rule 682, Texas Rules of Civil Procedure.

3. Plaintiff's Original Petition fails to allege clearly and distinctly each affirmative circumstance entitling him to relief and fails to negate every reasonable inference which, under the factual propositions stated, might defeat his right to a temporary restraining order without notice.

4. Plaintiff has posted no bond as required by law. The requirement for a bond was not waived or dispensed with by Order of the Court. Immediate and irreparable loss, injury and damage will result to Defendant if the Temporary Restraining Order is not dissolved and Plaintiff is not exempted from filing a bond in this cause.

5. Defendant has complied and will continue to comply with Article 9001, V.A.C.S.

6. Paintiff has denied these Defendants their Federal and State Constitutional rights to due process and equal protection of the laws in that these Defendants, and others of like classification, have been the only parties against whom the Plaintiff has sought to enforce Article 9001 V.A.C.S.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that the Court order a hearing on their Motion to Dissolve Temporary Restraining Order on or before December 19, 1975; that upon hearing, the Temporary Restraining Order be dissolved, or, alternatively in the event the Temporary Restraining Order be not dissolved that Plaintiff be required to post a good and sufficient bond, and for such other and further relief, general or special, at law or in equity to which they may show themselves justly entitled.

Respectfully submitted,

/s/ Leo C. Michaud
LEO C. MICHAUD
Attorney for Defendant

DEFENDANT'S ORIGINAL ANSWER

NO. 75-12371

THE STATE OF TEXAS — **In The 162nd**

VS. — **Judicial District Court**

GIBSON PRODUCTS COMPANY, INC., et al — **Dallas County, Texas**

Now come Gibson Products Company, Inc.; Gibson Products Inc. of Garland; Gibson Products Inc. of Richardson; Gibson Products Company Inc. of Bruton Terrace; Gibson Products of Oak Cliff, Inc.; James Smith, Dwight Wilson, Douglas Reagor, G.R. McMurray, and Charles Keenan, Defendants in the above styled and numbered cause and present this their Original Answer and as grounds therefor would respectfully show the Court:

1. These Defendants deny each and every all and singular the allegations contained in Plaintiff's Original Petition and demand strict proof thereof.

2. These Defendants allege that the provisions of Article 9001, Vernon's Annotated Civil Statutes, deprive them of the rights afforded them by virtue of Amendment Fourteen to the Constitution of the United States of America in the following particulars:

a. Said Article 9001, VACS, deprives these Defendants of their property rights without due process of law; and

b. Said Article deprives them of equal protection of the laws.

3. These Defendants would further show that the said Article 9001, VACS, is void and contrary to the protections afforded to them by Article 1, §3, §17, and §19 of the Constitution of the State of Texas in the following particulars:

a. Said Article deprives these Defendants of their equal rights, and entitles their competitors to exclusive and separate public privileges;

b. Said Article tends to take, damage or destroy the property of these Defendants, and to deprive them of their property rights for a purported public use without adequate compensation and without the consent of any of these Defendants; and

c. Enforcement of Article 9001, VACS, deprives these Defendants of their properties and their liberties and fails to afford them "the due course of law of the land".

4. Article 9001, VACS, is contrary to Constitutions of the State of Texas and of the United States for the following reasons:

a. The enumeration of items and classifications of item in §1 of said Article 9001, VACS, are vague, indefinite, confusing and impossible of enforcement; and

b. §2, Article 9001, VACS, is vague and indefinite in that it fails to apprise these Defendants of the meaning of "any sale or sales for charitable purposes"; and

c. § 4, Article 9001, VACS, is an improper and exaggerated exercise of the police power in that the declaration of the sale of the items or classifications or items enumerated in §1 to be a public nuisance, **per se**, bears no relation to the police power of the State and has no foundation in fact for the promotion of the health, recreation and welfare of the people of the State of Texas.

5. Enforcement of Article 9001, VACS, as sought by Plaintiff herein is unconstitutional, illegal and discriminates against the corporate Defendants herein, individually and as a class, and thus deprives these Defendants of their property rights by virtue of the unequal application and enforcement of the laws contrary to the Constitutions of the State of Texas and of the United States.

6. The issuance of a Temporary Restraining Order without notice and hearing thereon was an unconstitutional deprivation

of the property rights of these individuals, without the guarantees of due process guaranteed by the Constitutions of the State of Texas and of the United States.

7. These Defendants would further show, in the alternative, that they have complied with §2, Article 9001, VACS, and have conducted sales of the prohibited items for charity or charitable purposes.

WHEREFORE, PREMISES CONSIDERED, these Defendants pray that the Temporary Injunction Order heretofore granted against them on December 24, 1975 be dissolved and held for naught; that upon hearing hereof, Plaintiff take nothing by virtue of its Petition for a Permanent Injunction; and that Defendants be dismissed with their costs and for such other and further relief, at law or in equity, general or special, to which these Defendants may show themselves justly entitled.

Respectfully submitted,

/s/ Leo C. Michaud
LEO C. MICHAUD
Attorney for Gibson Products Company, Inc.; Gibson Products Inc. of Garland; Gibson Products Inc. of Richardson; and Gibson Products Company Inc. of Bruton Terrace; and the individual Defendants

/s/ Bardwell D. Odum
BARDWELL D. ODUM
ATTORNEY AT LAW
A PROFESSIONAL SERVICE CORPORATION
Attorney for Gibson Products of Oak Cliff Inc.

NOTICE OF LIMITATION OF APPEAL

NO. 75-12371-I

THE STATE OF TEXAS In the 162nd

VS. Judicial District Court

GIBSON PRODUCTS COMPANY, INC. ET AL Dallas County, Texas

To: Henry Wade, Criminal District Attorney, Dallas County, Texas

Thru: John H. Hagler, Assistant District Attorney, Dallas County, Texas

Pursuant to the provisions of Rule 353, Texas Rules of Civil Procedure, you are hereby notified that the Appeal of the Defendants, GIBSON PRODUCTS INC. OF RICHARDSON and GIBSON PRODUCTS OF OAK CLIFF INC., from the Temporary Injunction Order entered by the 162nd Judicial District Court in and for Dallas County, Texas on December 24, 1975, shall be confined and limited to the constitutionality or unconstitutionality of Article 9001, Vernon's Annotated Civil Statutes.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

* * *

NO. 76-1430

* * *

GIBSON PRODUCTS, INC., OF RICHARDSON,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

* * *

ANSWER TO PETITION FOR A WRIT OF CERTIORARI

* * *

JOHN L. HILL
Attorney General of Texas

HENRY WADE
Criminal District Attorney
Dallas County, Texas

DAVID M. KENDALL
First Assistant Attorney General

JOHN H. HAGLER
Assistant District Attorney
Dallas County, Texas

Attorneys For The State Of Texas

P.O. Box 12548, Capitol Station
Austin, Texas 78711

OF COUNSEL

May, 1977

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NO. 76-1430

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

* * *

GIBSON PRODUCTS, INC. OF RICHARDSON,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

* * *

ANSWER TO PETITION FOR A WRIT OF CERTIORARI

Respondent The State of Texas respectfully prays that the Writ of Certiorari be in all things denied and for grounds would respectfully show:

JURISDICTION

Generally, this Court has jurisdiction under Title 28 U.S.C. §1257(3) in that the validity of a statute of the State of Texas is drawn in question on the ground of its being repugnant to the Constitution of the United States. However, as the argument contained in this brief will show, Petitioner has not brought this case within the criteria of Rule 19(a) of this Court's rules for the consideration of an Application for a Writ of Certiorari. The very question here submitted has been previously determined by this Court in *McGowan v. State of Maryland*, 366 U.S. 420 (1961) and *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961).

QUESTION PRESENTED

The only question presented by this record is whether an economic regulation of the State of Texas that certain commodities may not be sold on both Saturday and Sunday is so far outside that wide latitude accorded states in the regulation of their local economies under their police powers that this Court should substitute its judgment for that of the Texas Legislature and declare the statute to have no rati al basis.

STATUTES INVOLVED

In its revision of the state's penal code, the Legislature of Texas removed what was Article 286a and transferred it to the civil statutes where it now appears as Article 9001 (Acts 1973, 63rd Legislature, Ch. 399, p. 883, §5) and provides:

Art. 9001. Sale of goods on both the two consecutive days of Saturday and Sunday

Prohibition of sales; items; misdemeanor

Section 1. Any person, on both the two (2) consecutive days of Saturday and Sunday, who sells or offers for sale or shall compel, force or oblige his employees to sell any clothing; clothing accessories; wearing apparel; footwear; headwear; home, business, office or outdoor furniture; kitchenware, kitchen utensils, china, home appliances; stoves; refrigerators; air conditioners; electric fans; radios; television sets; washing machines; driers; cameras; hardware; tools, excluding non-power driven hand tools; jewelry; precious or semi-precious stones; silverware; watches; clocks; luggage; motor vehicles; musical instruments; recordings; toys, excluding items

customarily sold as novelties and souvenirs; mattresses; bed coverings; household linens; floor coverings; lamps; draperies; blinds; curtains; mirrors; lawn mowers or cloth piece goods shall be guilty of a misdemeanor. Each separate sale shall constitute a separate offense.

Sales for charitable and funeral or burial purposes; real property sales

Sec. 2. Nothing herein shall apply to any sale or sales for charitable purposes or to items used for funeral or burial purposes or to items sold as a part of or in conjunction with the sale of real property.

First offense; subsequent convictions; penalties

Sec. 3. For the first offense under this Act, the punishment shall be by fine of not more than One Hundred Dollars ($100.00). If it is shown upon the trial of a case involving a violation of this Act that defendant has been once before convicted of the same offense, he shall on his second conviction and on all subsequent convictions be punished by imprisonment in jail not exceeding six (6) months or by a fine of not more than Five Hundred Dollars ($500.00), or both.

Purpose; public nuisances; injunction; application and proceedings

Sec. 4. The purpose of this Act being to promote the health, recreation and welfare of the people of this state, the operation of any business whether by any individual, partnership

or corporation contrary to the provisions of this Act is declared to be a public nuisance and any person may apply to any court of competent jurisdiction for and may obtain an injunction restraining such violation of this Act. Such proceedings shall be guided by the rules of other injunction proceedings.

Emergency purchases; certification

Sec. 4a. Repealed by Acts 1967, 60th Leg., p. 79, ch. 39 §1, eff. Aug. 28, 1967.

Occasional sales

Sec. 5 Occasional sales of any item named herein by a person not engaged in the business of selling such items shall be exempt from this Act.

Legislative intent

Sec. 5a. It is the intent of the Legislature that Articles 286 and 287 of the Penal Code of Texas[1] are not to be considered as repealed by this Act; provided, however, that the provisions of said Articles shall not apply to sales of items listed in Section 1 of this Act which are forbidden to be sold on the day or days named in this Act.

STATEMENT OF THE CASE

Respondent cannot agree to the "statement of material facts" found in the Petition for Writ of Certiorari for it is more argumentative than it is

[1]Now repealed by Acts 1973, 63rd Leg., p. 991, ch. 399 §3 (a), enacting the new Texas Penal Code.

declarative. It does, however, contain the essential facts which are that on December 24, 1975, following a hearing, a state district court enjoined Petitioner from further violations of Article 9001, Vernon's Texas Civil Statutes, by continuing to offer for sale, selling, or compelling, forcing or obligating their employees to sell on the two consecutive days of Saturday and Sunday a list of items taken from Section 1 of Article 9001. Petitioner took a direct appeal to the Supreme Court of Texas, by-passing Texas' intermediate appellate court, by virtue of Rule 499a, Texas Rules of Civil Procedure (Appendix A). By virtue of that rule, such an appeal could present only the constitutionality or unconstitutionality of a statute of the State or the validity or invalidity of an administrative order issued by a state board or commission under a state statute when that question arose by reason of a trial court granting or denying an injunction.

In an opinion which Petitioner criticizes for its brevity (Petition, page 5) the Texas Supreme Court on December 22, 1976 affirmed the judgment of the district court and upheld the constitutionality of the statute. *Gibson Products Company, Inc. v. State*, 545 S.W.2d 128 (Tex. Sup. 1976)

The Texas Supreme Court based its decision in large part upon a long line of prior decisions upholding the constitutionality of the predecessor to Article 9001, stating:

> " . . . it has often been upheld as constitutional against the same equal protection and due process arguments as are repeated here. State v. Spartan's Industries, Inc., 447 S.W.2d 407 (Tex. 1969), dism'd for want of a substantial federal question 397 U.S. 590, 90 S.Ct. 1359, 25 L.Ed.2d 596; Ralph Williams Gulfgate

Chrysler Plymouth, Inc. v. State, 466 S.W.2d 639 (Tex.Civ.App. 1971, writ ref'd n.r.e.); Sundaco, Inc. v. State, 463 S.W.2d 528 (Tex.Civ.App. 1970, writ ref'd n.r.e.); Levitz Furniture Co. v. State, 450 S.W.2d 96 (Tex.Civ.App. 1969, writ ref'd n.r.e.)." (545 S.W.2d at 129)

The Supreme Court of Texas denied rehearing on January 19, 1977 and, within ninety days from that date, this Petition for Writ of Certiorari was filed.

ARGUMENT

In stating the question presented, Petitioner specifies four constitutional violations:

(1) violation of the right of a member of the consuming public to shop and buy at will "guaranteed by the due process clause."

(2) arbitrary deprivation of the right of a merchant to pursue his occupation by depriving him of the right to sell certain merchandise on any day when it is legal for him to have his place of business open, guaranteed by the due process clause.

(3) arbitrary discrimination against sellers of tangible products in favor of sellers of services, prohibited by the equal protection clause.

(4) arbitrary discrimination against sellers of certain commodities (socks) in favor of sellers of other commodities (cigarettes, liquor) prohibited by the equal protection clause.

As to the first of these, the issue of the right of a member of the consuming public was not before the court below and is not properly before this Court. Petitioner is not a consumer.

In *McGowan v. State of Maryland*, 366 U.S. 420 (1961), Mr. Chief Justice Warren stated the questions presented to include " . . . whether the classifications within the statutes bring about a denial of equal protection of the law . . . " (366 U.S. at 422) There the statute prohibited the sale of socks, while permitting the sale of cigarettes, confectioneries, milk, bread, etc. The court found the statute constitutional saying:

> "The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. (Citations omitted)
>
> "It would seem that a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day - that a family which takes a Sunday ride into the country will need gasoline for the automobile and may find pleasant a soft drink or fresh fruit; that those who go to the beach may wish ice cream or some other item normally sold there; that some people will

prefer alcoholic beverages or games of chance to add to their relaxation; that newspapers and drug products should always be available to the public.

"The record is barren of any indication that this apparently reasonable basis does not exist, that the statutory distinctions are invidious, that local tradition and custom might not rationally call for this legislative treatment. (Citations omitted)" (366 U.S. at 425-426)

The greatest latitude is given to the states in adopting police regulations and establishing classifications upon which they depend, so long as there is no suspect classification as, for instance, race or religion. Thus, for instance, in *Dandrige v. Williams*, 397 U.S. 471 (1970), Mr. Justice Stewart, speaking for the majority of the court, said:

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because its classifications made by its laws are imperfect. If this classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality . . . . ' 'A statutory discrimination will not be set aside if any state of fact reasonably may be conceived to justify it.' McGowan v. Maryland, . . . "(397 U.S. at 485)

Similarly, in *McLaughlin v. State of Florida*, 379 U.S. 184 (1964), Mr. Justice White, speaking for a unanimous court, said:

"Normally, the widest discretion is allowed the legislative judgment in determining

whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classifications as reasonable rather than arbitrary and invidious . . . " (379 U.S. at 191)

In *City of New Orleans v. Dukes*, ___U.S.___, 96 S.Ct. 2513 (1976), the court, in a per curiam opinion discussing the validity of the ordinance of the City of New Orleans which discriminated between vendors who had continually operated their businesses for eight years and those who had not, said:

"When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determination as to the desirability of particular statutory discrimination. [Citations omitted] Unless a classification trammels fundamental personal rights or is drawn upon inherently suspected distinctions such as race, religion, or alienage, or decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude . . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . in local economic fear, it

> is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with Fourteenth Amendment . . . . " (96 S.Ct. at 2516-2517)

Numerous other cases might be cited but certainly this Court is familiar with the rules which it has applied in the past and should apply here.

The stated purpose of the Legislature of Texas in adopting Article 9001 and its predecessor is "to promote the health, recreation, and welfare of the people of this state." While certainly Petitioner is entitled to believe that there are better ways to serve that purpose than that employed by Article 9001, it cannot be said that the Texas scheme has no rational relationship to the legitimate state purposes.

And, finally, it must be remembered that the Texas statute does not discriminate between merchants. It treats them identically. *All* merchants, for example, can sell cigarettes or liquor. *None* can sell socks. No merchant, therefore, is denied equal protection. He is denied due process only if this court can say that constitutionally the State is required to permit all merchants of socks to sell their wares seven days a week.

CONCLUSION

In 1961 this Court thoroughly examined the validity of state statutes limiting commercial activities on Saturdays or Sundays. Those decisions have been consistently followed and have established a body of law upon which states have acted and relied. There is nothing about Article 9001 of the Texas statutes which would call for a different rule to be adopted at this time. The statute is a reasonable attempt by the Texas Legislature to curtail mercantile activity to such an extent as to promote the health, recreation and welfare

of the people of the State in general and of those who are employed in mercantile establishments in particular. The State legislatively has stated that Petitioner's employees should not be required to work seven days a week and that, to promote that end, Gibsons should not sell unessential items on seven consecutive days. This is a reasonable regulation having a relationship to the purpose it serves and does not result in any invidious classification. Certiorari should not be granted.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

HENRY WADE
Criminal District Attorney
Dallas County, Texas

DAVID M. KENDALL
First Assistant Attorney General

JOHN H. HAGLER
Assistant District Attorney
Dallas County, Texas

Attorneys For The State Of Texas

P.O. Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, David M. Kendall, do hereby certify that on this 12 day of May, 1977, a true and correct copy of the above Answer to Petition for a Writ of Certiorari was mailed to Bardwell D. Odum, P.O. Box 38529, Dallas, Texas 75238 and Mr. Leo C. Michaud, 1266 E. Ledbetter, Dallas, Texas 76216, Attorneys for Petitioner.

David M. Kendall

APPENDIX A

Rule 499a. Direct Appeals

In obedience to an act of the Regular Session of the Forty-eighth Legislature approved February 16, 1943, and entitled "An Act authorizing appeals in certain cases direct from trial courts to the Supreme Court: authorizing the Supreme Court to prescribe rules of procedure for such appeals; and declaring an emergency," which act was passed by authority of an amendment known as Section 3 b of Article 5 of the Constitution, the following procedure is promulgated:

(a) In view of Section 3 of Article 5 of the Constitution which confines the appellate jurisdiction of the Supreme Court to questions of law only, this court under the present and later amendment, above cited, and such present and any future legislation under it, has and will take appellate jurisdiction over questions of law only, and in view of Sections 3, 6, 8 and 16 of such Article 5, will not take such jurisdiction from any court other than a district or county court.

(b) An appeal to the Supreme Court directly from such a trial court may present only the constitutionality or unconstitutionality of a statute of this State, or the validity or invalidity of an administrative order issued by a state board or commission under a statute of this State, when the same shall have arisen by reason of the order of a trial court granting or denying an interlocutory or permanent injunction.

(c) Such appeal shall be in lieu of an appeal to the Court of Civil Appeals and shall be upon such question or questions of law only, and a statement of facts shall not be brought up except to such extent as may be

necessary to show that the appellant has an interest in the subject matter of the appeal and to show the proof concerning the promulgation of any administrative order that may be involved in the appeal. If the case involves the determination of any contested issue of fact, even though the contested evidence should be adduced as to constitutionality or unconstitutionality of a statute, or as to the validity or invalidity of an administrative order, neither the statute or statutes, above mentioned, nor these rules, apply, and such an appeal will be dismissed.

(d) Except where they are inconsistent with this rule, the rules now or hereafter prescribed in instances of appeal to the Courts of Civil Appeals shall, in so far as they are applicable, apply to appeals to the Supreme Court pursuant to such amendment to the Constitution and the legislation thereunder. Promulgated by order of June 16, 1943, effective December 31, 1943.